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IN THE

Supreme Court of the United States

GREENBRIER, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when the government passes legislation twenty years after the execution of a contract with a private party that prohibits the private party from exercising his vested, unconditional contractual option, the aggrieved party must pursue a futile regulatory approval process prior to instituting a Fifth Amendment takings claim; and

2. Whether, when the government and a private party enter into a complex, multi-party transaction that is memorialized in contemporaneous and interrelated documents, the government may avoid a material promise it made to induce the private party to participate in the transaction, while contemporaneously seeking to enforce the very same mutually-dependent obligations in other litigation.

PARTIES TO THE PROCEEDING

The Petitioners are Greenbrier, Woodlake Village Partnership, Carrier Arms Apartments, Ltd., Colonial Terrace Apartments Ltd., First Brookwood, Ltd., First Buena Vida, Ltd., First Fairmont II, Ltd., First Plaza Dorado Limited Partnership, First Village West Limited Partnership, First Plaza Hills East Limited Partnership, High House Village Apartments, Ltd., Hillcrest Apartments, Ltd., Jackson Manor Apartments, Ltd., Skyline Fox Hollow Joint Venture, South Park Apartments, Ltd., Southside Village Apartments, Ltd., First Parkwood Limited Partnership, American River Limited Partnership, Aspen Manor, Bear Mountain Village, Camelot North Company, Camelot South Company, Canyon Apartments Company, Cascade Terrace Limited Partnership, Cottonwood Manor Company, Ellendale Arms Apartments, Escondido Park Apartments, Foothill Gardens Limited Partnership, Hollister Plaza Limited, Imperial Villa Apartments, LaVerne Terrace Limited Partnership, Laurel Canyon Terrace, Meyler Park Apartments, Miller Avenue Apartments, Napa Park Ltd., Ontario Townhouses, Palmdalia Limited Partnership, Queen Ann Investment Company, Rose Gardens Housing Limited, Santa Clara Terrace Company, Tempe Apartments, A Limited Partnership, Tempe Garden I, C.A. Hobbs, Jr., Lauryce G. Hobbs, Charles L. Adrian, Southbrook Garden Apartments, Ltd., Sugar Grove Square, Ltd., Hugh V. Smith Enterprises, Inc. and First Fairmont Terrace, Ltd.

The Respondent is the United States.

None of the Petitioners has a parent company and no publicly held company owns 10% or more of the stock of any Petitioner.

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Petitioners Greenbrier, et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (*See* Appendix, *infra*, at 1a-29a) is recorded at 193 F.3d 1348. The order denying a petition for rehearing and suggestion for rehearing *in banc* (*id.* at 66a-68a) is unreported. The opinion of the Court of Federal Claims (*id.* at 30a-65a) is reported at 40 Fed. Cl. 689.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1999. A petition for rehearing and suggestion for rehearing *in banc* was denied on December 27, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of the following constitutional, statutory and regulatory provisions are set forth in App., *infra*, 100a-109a:

U.S. Const. amend. V

Emergency Low-Income Housing Preservation Act of 1987, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988)

Low-Income Housing Preservation Act of 1990, Pub. L. No. 101-625, tit VI, 104 Stat. 4249 (1990), 12 U.S.C. § 4101, *et seq.*

24 C.F.R. § 221.524 (1970)

24 C.F.R. § 236.30 (1970)

INTRODUCTION

This petition raises fundamental issues of law that affect all who enter into complex transactions with the government. The Federal Circuit's decision in this case is inconsistent with this Court's opinions in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997), *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), and *Winstar Corp. v. United States*, 518 U.S. 839 (1996).

Contrary to *Suitum*, the decision here permits the government to escape liability under the Fifth Amendment's Takings Clause by conditioning a party's legal standing on the compliance with a regulatory process *incapable* of restoring the right taken.[1] Moreover, the Federal Circuit's decision fails to consider the "justice and fairness" of the highly retroactive and unduly burdensome imposition at issue, as suggested by this Court in *Eastern Enterprises*.

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1. Because Petitioners' claims are founded on Congress' abrogation of the owners' unfettered contractual right to withdraw their property from the Section 221(d)(3) and Section 236 programs, *without HUD permission*, twenty years after HUD's final endorsement, the fact that ELIHPA and LIHPRHA, by their terms, provided a procedure by which the owners could apply for permission to exercise their previously unrestricted right to prepay, is utterly irrelevant to whether Congress, by legislative fiat, abrogated the owners' previously unrestricted rights to prepay.

Finally, the Federal Circuit's decision ignores this Court's *Winstar* decision and allows the government to escape contractual liability through a subsequent legislative change of heart. The impact of the Federal Circuit's decision on all who contract with the government is enormous.

STATEMENT OF THE CASE

> Twenty-some years ago, the Department of Housing and Urban Development began entering into contracts with owners and developers where in exchange for an interest rate subsidy, the property owners agreed to hold hundreds of thousands of units open as low-income housing units.
>
> Under the terms of the contracts, the owners were allowed after 20 years to prepay the mortgages, and at that point to opt out of the HUD programs. When these contracts began to reach their 20-year maturity, somebody got nervous. In fact, it appears they got so nervous that they just could not stand the idea that maybe somebody would actually opt out of the contracts, and that therefore it would be a good idea to enact a moratorium on the right of the owners to prepay their mortgages.
>
> In fact, that is exactly what happened in the Low-Income Housing Preservation Act of 1987. There are many of us in this Chamber and elsewhere who have doubts as to the advisability . . . and the constitutionality of that.

> . . . These poor devils that entered into these contracts 22 or 23 years ago probably had the mistaken notion that the Federal government was going to honor its word.

136 Cong. Rec. 26,382-83 (1990) (statement of Senator Armstrong).

Notwithstanding Senator Armstrong's and many of his colleagues' opposition, Congress enacted legislation repudiating the government's promise to these developers that they could prepay their mortgages and opt out of the low-income housing program after 20 years. Legislators on both sides of the issue recognized that the legislation breached a contractual commitment made by the Department of Housing and Urban Development ("HUD") to the developers. Until this litigation, HUD recognized this as well.[2] In the decision below, however, the Federal Circuit, relying on its earlier decision in *Cienega Gardens*, agreed with HUD's litigation-born view that it made no such promise. App., *infra*, 12a-14a. In so concluding, the Federal

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2. As Judge Rader noted in concurring with the panel's decision below, the diametrically opposed position taken by HUD in *United States v. David*, 1998 WL 351693 1630 (E.D. Pa. June 30, 1998) "undermines this court's reliance on *Cienega Gardens*, which itself looks suspect in the context of the arguments the United States made in the Pennsylvania District Court." (Appendix, *infra*, 25a). Those arguments, including the government's assertion that all of the related documents construed together "compromise the entire contract between the parties," *David*, 1998 WL 351693, at *4, stand in stark contrast to HUD's arguments both in this case and in the case of *Cienega Gardens, et al. v. United States*, 194 F.3d 1231 (Fed. Cir. 1998), namely that the related documents are separate agreements which, absent an integration clause, must be construed separately.

Circuit eviscerated the rights of hundreds of developers who had joined with the government to build and maintain the nation's low-income housing.

This case involves agreements between the United States and private developers who built and operated federally-assisted, low-income housing projects under programs established by Section 221(d)(3) of the National Housing Act (NHA), Pub. L. No. 83-560, 68 Stat. 590, 599 (1954), *as amended by* Pub. L. No. 87-70, 75 Stat. 149 (1961), and Section 236 of the NHA, Pub. L. No. 90-448, § 201(a), Stat. 476, 498-99 (1968). These federal programs were designed to, and did, encourage private parties to construct, own, and manage housing for low- and moderate-income families.[3] *See, e.g.*, H.R. Rep. No. 90-1585, at 2 (1968). They encouraged private development principally by providing mortgage insurance (which enabled the developers to obtain private loans) and affording developers the benefit of below-market interest rates (under Section 221(d)(3)) or direct interest subsidiaries (under Section 236). App., *infra*, 4a. The developers were required to pass these financial benefits along to their tenants in the form of lower rent payments. *Id.*

Petitioners are among the hundreds of private developers who accepted the government's invitation to participate in the Section 221(d)(3) and Section 236 programs. Their agreements were memorialized by the parties' execution of a series of detailed, interlocking contracts, all mandated, drafted, and approved by HUD. In each case, HUD issued a Commitment for Insurance of Advances, addressed to the

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3. This brief generally will use the term "low-income" to refer to these classifications.

Petitioner and the private lender for the project, which "set[] forth the terms and conditions upon which the mortgage [would] be insured." 24 C.F.R. § 221.509(a) (1970). The Commitment was an offer by HUD, "under the provisions of [Section 221(d)(3) or Section 236, as applicable] of the National Housing Act, and the Regulations thereunder [then] in effect," to insure a deed of trust note between the Petitioner and the lender upon their satisfaction of specified conditions. *Id.* at 5a-6a. "All certificates, documents, and agreements called for by [the] [C]ommitment [were required to] be on forms approved or prescribed by [HUD]." *Id.* at 6a.

Among other things, each Petitioner entered into a regulatory agreement with HUD "[i]n consideration of the endorsement for insurance by [HUD] of the [deed of trust] note."[4] *Id.* at 7a. In the regulatory agreement, each Petitioner agreed to make all payments due under the note; to grant HUD a security interest in the income arising from the project; to rent to HUD-approved tenants at HUD-approved rent levels; to accept a six percent cap on its return on original equity; to submit to HUD audits, inspections, and management reviews; and to maintain the project according to HUD standards. *See, e.g.*, Federal Circuit Joint Appendix ("Fed. Cir. J.A.") at 216. Each Petitioner was bound by these obligations for so long as HUD insured the mortgage; once the mortgage was paid off (or prepaid), HUD's

4. HUD signed the deed of trust notes twice as an endorser. 24 C.F.R. § 207.254 (1970). The first endorsement evidenced HUD's insurance of the mortgage. *Id.* § 207.254(a). The second endorsement, made after completion of construction, confirmed that the conditions for mortgage insurance had been fulfilled, and that all advances of mortgage proceeds had been made. *Id.* § 207.254(b).

insurance obligation would terminate, and the Petitioner's obligations under its regulatory agreement would expire. App., *infra*, 7a.

Although the mortgages had 40-year terms, Petitioners had the unfettered right to prepay after 20 years. This right was set forth expressly either on the note or in a rider to the note. *Id.* at 6a. The note was prepared on a standardized form drafted and prescribed by HUD. The prepayment language in the Section 221(d)(3) note provides that "a maker which is a limited distribution mortgagor may prepay without [HUD] approval after twenty (20) years from the date of final endorsement of this Deed of Trust Note."[5] *Id.* The Section 236 note contained similar language. The prepayment right set forth in these riders was consistent with contemporaneous HUD regulations governing the Section 221(d)(3) and Section 236 programs. 24 C.F.R. §§ 221.524(a)(ii), 236.30(a)(i) (1970).

In reliance on their right to prepay and convert to conventional rentals at the end of the 20-year period, Petitioners developed properties that they believed would increase in value and allow them to attract market rate tenants. Fed. Cir. J.A. at 129. They paid premiums for sites in middle class areas, constructed quality buildings and maintained the buildings with the same care as their conventional rentals. *Id.*

In the mid-1980s, Congress became "concerned that a large number of housing project Owners would prepay their mortgage loans" and thereby exit the Section 221(d)(3) and

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5. The right to prepay after 20 years without HUD approval was restricted to limited distribution mortgagors. App., *infra*, 6a. Petitioners are limited distribution mortgagors.

Section 236 programs. *Id.* at 8a. Fearing a shortage of affordable housing for low income tenants, Congress enacted the Emergency Low-Income Housing Preservation Act of 1987 ("ELIHPA"), Pub. L. No. 100-242, Tit. II, 101 Stat. 1877 (1988). ELIHPA established a temporary moratorium on prepayment to provide Congress with breathing room to develop a permanent solution. App., *infra*, 8a. Under ELIHPA, a developer was permitted to prepay only if the termination of HUD restrictions would not cause hardship to current tenants or materially affect the availability of low income housing. ELIHPA §§ 222, 225, 12 U.S.C. § 1715*l* note.

In 1990, Congress replaced ELIHPA's temporary measures with the Low-Income Housing Preservation And Resident Homeownership Act of 1990 ("LIHPRHA"), Pub. L. No. 101-625, Tit. VI, 104 Stat. 4249 (1990), 12 U.S.C. § 4101, *et seq*. LIHPRHA made permanent the moratorium on unrestricted prepayment. App., *infra*, 8a. LIHPRHA also gave HUD the authority to grant "incentives" to encourage developers "to maintain affordability restrictions on their properties and not prepay their mortgage loans." *Id.* Nevertheless, LIHPRHA, like ELIHPA, prevented developers from prepaying their mortgage loans after twenty years without HUD approval, as had been permitted by the deed of trust notes and HUD regulations. *Id.*

As HUD expressly acknowledged at the time, the specific purpose of ELIHPA and LIHPRHA was to repudiate the government's promise to allow developers to prepay their insured mortgages and exit the low-income housing program after 20 years. In 1986, R. Hunter Cushing, the Deputy Assistant Secretary for HUD's Multifamily Housing Programs, testified before Congress that, with respect to

prepayment, "*there was a contractual relationship between the Federal Government and private owners, that was negotiated at that time, . . . an arm's length transaction that cannot be changed.*" *Loss of Subsidized Multi-family Housing Units: Hearing Before the Subcomm. On Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs,* 99th Cong. 17 (1986) ("*Loss of Subsidized Housing Units*") (emphasis added). Senator D'Amato, who introduced ELIHPA, acknowledged that "[o]wners of projects, who have lived up to a 20-year agreement with the Federal Government, may be forced [by the moratorium on prepayment] to renegotiate their contracts with the Government." 133 Cong. Rec. 22,209 (1987). Congress determined, however, that the immediate threat to low-income housing justified compromising the prepayment rights of the private developers. *See, e.g.*, H.R. Rep. No. 100-122(I), at 37 (1987) ("The Committee wishes to state that in developing these provisions every attempt was made to balance the contract rights of owners with the need to try to preserve the existing stock of housing for low income persons.").

In 1990, when Congress considered LIHPRHA, HUD Secretary Jack Kemp testified that the existing moratorium on prepayment was a trespass on the rights of low-income housing developers and emphasized the government's duty to fulfill the "commitment to the contract that we entered into with people." *HUD Legislative Proposals: Hearing Before the Subcomm. On Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs,* 101st Cong. 41 (1990). The Members of the House Committee that proposed LIHPRHA similarly understood that the legislation would breach contracts that the federal government had executed with low-income

housing developers. *See Preservation and the Loss of Subsidized Housing Stock: Hearing Before the Subcomm. On Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs,* 101st Cong. 23-24 (1990); *id.* at 6 ("Just because [of] some fine print allowing prepayment, we're not to cave in and abandon that commitment to tenants.") (statement of Rep. Kennedy); *see also* 136 Cong. Rec. 21,244 (1990) ("In many of the contractual agreements with the government, developers were promised the opportunity to prepay these 40-year mortgages after 20 years.") (statement of Rep. Hoagland).

Extension of the moratorium generated extended and heated debate, with many Members of Congress opposing the legislation on grounds that the United States should honor its contractual commitments. Senator Heflin, among others, addressed the point directly:

> Mr. President, I rise today to address an issue which I feel is of the utmost importance: that is the obligation of the U.S. Government to fulfill contractual agreements into which it enters, or, at a minimum, to justly compensate those parties whose contractual rights it abrogates.
>
> In 1961, Congress enacted the 221(d)(3) program to encourage private development of low- and moderate-income housing under which the Government offered project owners federally insured, 40-year loans at the Federal borrowing rate. In exchange, the Government required that project owners pass the interest benefits to the tenants through lower rents. The owners undertook the risk of building and operating the housing in

> addition to accepting the limitations of the use of their property and distribution of earnings. This was balanced by the unrestricted right to prepay these mortgages and use the property freely after 20 years.
>
> . . . Mr. President, the very notion of unilaterally abrogating a contract, which has been adhered to by one party for 20 years, flies in the face of the law. I am opposed to it, except in the most extreme circumstances. And when such circumstances arise, that party whose rights are denied must be fully compensated.

136 Cong. Rec. 26,372 (1990).

Even the proponents of an extended moratorium on prepayment acknowledged that it would compromise the government's contracts with the housing developers. Senator Cranston defended the legislation by asserting that Congress's authority to "adjust the burdens and benefits of economic life" included the ability to "specifically alter the instrument of the parties who contracted with the Federal government." *Id.* at 26,371; *see also id.* at 26,385 ("I do not think we have a right to arbitrarily say contracts that were entered into in good faith years ago, which drew people into an arrangement which allowed them to put their private capital on the table and suggested to them sometime as a consequence of that they would be able to make a profit — all of a sudden we would be willing to say sorry, we are changing the rules.") (statement of Senator Kerry).

Ultimately, Congress determined (as it had in 1988) that the threat of losing low-income housing justified the new legislation. Pub. L. No. 101-625, 104 Stat. 4249 (1990); *see also* H.R. Conf. Rep. 101-625, at 458 (1990).

Petitioners, 249 low-income housing development partnerships, brought this action under the Tucker Act, 28 U.S.C. § 1491, to recover damages they suffered from their inability to prepay their mortgages and convert their properties to market rentals. App., *infra*, at 3a. The Petitioners contend that the prepayment right was explicitly part of their agreement with the government because the government: (1) established the terms of the programs; (2) analyzed, negotiated, and approved every detail of every project designed, constructed and operated under the programs; (3) directed that the petitioners use only forms prepared by the government; and (4) accepted performance for a period of over twenty years.[6] In the alternative, Petitioners argue that the government's unilateral abrogation of their prepayment rights constituted an impermissible regulatory taking, for which Petitioners are entitled to compensation. In an order dated April 9, 1998, the Court of Federal Claims granted the government's motion for summary judgment as to Petitioners' breach of contract claim, holding that Petitioners had no contractual prepayment right vis-à-vis the government because the Petitioners' prepayment rights were embodied in a series of documents signed contemporaneously, rather than in a single document containing the signature of both the Petitioners and HUD. *See* App., *infra*, 25a. The Court of Federal Claims also granted the government's motion for summary judgment as to Petitioner's takings claims, holding that because Petitioners did not apply to HUD for permission to exercise their previously unfettered prepayment rights, Petitioners' takings claims were not ripe for review. *Id.* at 36a.

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6. *See* 12 U.S.C. §§ 1715*l*(d)(3), 1715(z-1)(1994).

In an opinion dated October 4, 1999, the Court of Appeals for the Federal Circuit, bound by its earlier *Cienega Gardens* decision, affirmed the lower court's determination that "the United States [is] not in privity of contract with the Owners with respect to the prepayment terms found in their mortgage notes and it is therefore not liable for breach of such contracts." App., *infra*, at 13a-14a. As Judge Radar recognized in his concurrence, however, the diametrically opposed position taken by HUD in *United States v. David* "undermines th[e] court's reliance on *Cienega Gardens*, which itself looks suspect in the context of the arguments the United States made in the Pennsylvania District Court." *Id.* at 25a; *see supra*, note 2.

The Federal Circuit also affirmed the dismissal of Petitioners' takings claim on ripeness grounds, holding that the fact that HUD "set a high hurdle by imposing stringent requirements for granting [permission to prepay] does not excuse the Owners' failure to seek such permission." App., *infra*, at 22a-23a. The Federal Circuit distinguished this Court's opinion in *Suitum* by noting that in *Suitum* "there was no question about how the regulations at issue applied to the land in question." *Id.* at 23a. The court further observed that the agency in *Suitum* had no discretion to exercise over how the regulations would affec the aggrieved party. *Id.*

REASONS FOR GRANTING THE WRIT

Over 20 years ago, the government intentionally induced hundreds of private developers across the nation to invest billions of dollars to construct and operate low-income housing with the promise that, after 20 years, they would have the unfettered right to convert their property to market rentals.

The Federal Circuit's approach to these complex, multiparty government agreements is contrary to core, longstanding principles of law and flatly inconsistent with this Court's guidance in *Winstar*. If it is not reversed, this decision will not only result in manifest injustice to hundreds of private developers, but will gravely affect the government's ability in the future to enlist the private sector in partnership for its public programs. The Court should grant this petition for certiorari because of the importance of the questions raised to the administration of government contracts and to the legitimate expectations of thousands of private parties who contract with the government.

I. Petitioners' Claim That The Government Effected A Regulatory Taking Of Their Unfettered Rights To Prepay Their HUD-Insured Mortgages Is Ripe For Review.

This Court should grant the Owners' petition because by holding that Petitioners' takings claims were not ripe for review, the Federal Circuit failed to accord proper weight to this Court's decision in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997). In *Suitum*, the petitioner owned a parcel of undeveloped land in Tahoe County, Nevada that was subject to the jurisdiction of the Tahoe Regional Planning Agency. Based on the agency's environmental restrictions, the agency denied Suitum permission to build a house on her lot. The issue before this Court was whether petitioner's claim of a regulatory taking of her land was ripe for judicial review. *Id.* In holding for the petitioner, this Court reasoned that "[t]he demand for finality is satisfied by Suitum's claim, . . . there being no question . . . about how the regulations at issue apply to the

particular land in question."[7] This Court found it significant that the agency had no discretion to exercise over Suitum's right to use her land.[8] Because Suitum was not challenging the validity of the agency's regulations, but rather her right to be paid as a result of their consequences, the only discretionary step left to the agency was enforcement, not determining applicability.

HUD's relationship vis-à-vis Petitioners is no different from that analyzed in *Suitum*. Like the petitioner in *Suitum*, as alleged in ¶¶ 39-58 of Plaintiffs' First Amended Complaint, Congress, by statute, had made a final decision that the owners could not prepay their mortgages without HUD approval. The owners lost the certainty of prepayment, and were left with only the possibility of gaining approval to exercise certain new "rights" (the "right" to apply for permission to prepay, or permission to sell their properties to approved substitute owners.) Thus, whatever decisions HUD may or may not make under ELIHPA and LIHPRHA are utterly irrelevant to whether Congress took appellants' previously unrestricted rights to prepay. Once Congress abrogated these rights, Petitioners' claims were ripe. The clear text of the statute prohibits prepayment in the absence of an approved Plan of Action,[9] and HUD clearly communicated this position to both the lenders and the owners through Mortgagee Letter 88-3. *See* Fed. Cir. J.A. at 86.

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7. 117 S. Ct. at 1667 (citation omitted).

8. *Id.*

9. *See* 12 U.S.C. §§ 4101, 4102, 4107.

In its opinion, the Federal Circuit failed to appreciate that although ELIHPA and LIHPRHA, by their terms, provided a procedure by which the owners could apply for permission to exercise their previously unrestricted right to prepay,[10] it was the imposition of that process itself that deprived appellants of their unfettered right to exit HUD's regulatory program, in violation of the Fifth Amendment. Whether HUD would or would not have permitted an individual owner to prepay is utterly irrelevant to whether

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10. Furthermore, the panel's decision assumes that, at the moment ELIHPA was enacted, there existed a process by which Petitioners could apply for permission to prepay. In reality, however, all program participants affected by this legislation were subjected to a confusing set of laws, regulations and notices during the period after the enactment of ELIHPA on February 5, 1988. In the legislation, Congress directed the Secretary of HUD to issue implementing regulations for ELIHPA by May 21, 1988. This HUD failed to do. Instead it issued an interim rule on April 5, 1988 with an effective date of May 20, 1988. It then issued final implementing regulations on September 21, 1990 with an effective date of October 22, 1990. The final rule differed markedly from the interim rule since it reflected many changes based upon voluminous public comments on the interim rule. In addition, the ELIHPA final rule included changes mandated by the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, and Sections 201 through 203 of the Department of Housing and Urban Development Reform Act of 1989. This transitory nature of ELIPHA was recognized in LIHPRHA by the insertion of Section 248.5, which was titled Election to Proceed Under Subpart B or Subpart C of this part of the interim rule published on April 8, 1992. This Election provided certain owners with a right to process a plan of action under either ELIHPA or LIHPRHA. In other words, during the period from February 5, 1988 until May 8, 1992, to suggest that a general state of confusion existed among program participants regarding their rights and obligations vis-à-vis prepayment would be a substantial understatement.

Congress, by legislative fiat, abrogated the owners' previously unrestricted rights to prepay. There is no requirement that administrative remedies be exhausted "when the question of the administrative remedy is for all practical purposes identical with the merits of the case."[11]

The right to exit the Section 221(d)(3) and Section 236 programs through prepayment after twenty years is a valid contractual option. The government has never disputed the existence of this right. The owners had an unrestricted right to prepay their mortgages at any time after the twentieth anniversary of their mortgage insurance endorsement. The right existed at all times after that date and could be exercised when they chose to do so. Until the enactment of ELIHPA, the owners' rights to terminate their relationship with the government were alive and valid, entirely within the discretion and under the control of the owners.

At the moment the right to exit matured, the owners had no duty or obligation to the government to do or not do anything. ELIHPA and LIHPRHA abrogated that right completely and imposed a burden where none previously existed. The owners had no constitutional obligation to pursue this so-called "incentive" the government offered in those statutes, and the panel erred in holding otherwise.

The Federal Circuit further erred in holding that because ELIHPA and LIHPRHA "merely assert regulatory jurisdiction" over Petitioners' ability to exercise their prepayment rights, their enactment cannot constitute a taking of any property rights. App., *infra*, 20a. As this Court noted

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11. *Oregon Envtl. Council v. Department of Envtl. Quality*, 775 F. Supp. 353, 364 (D. Or. 1991).

in *Eastern Enterprises*, legislation can be deemed unconstitutional "if it imposes severe retroactive liability on a limited class of persons that could not have anticipated the liability. . . ." *Eastern Enterprises*, 524 U.S. at 528-29. This is especially true where, as here, the retroactive legislation deprives citizens of legitimate expectations and upsets settled transactions. *Id.* at 533.

There can be no doubt that, prior to 1988, both HUD and the Petitioners believed that the 221(d)(3) and 236 participants could prepay their HUD-insured mortgages twenty years after the date of final endorsement. Prior to the enactment of ELIHPA, Petitioners had no reason to anticipate that they would be conscripted into providing low-income housing for a period of forty years — *twice* that originally contracted for. Such an undue burden, imposed not on society, but on a limited group of low-income housing providers, clearly "implicates fundamental principles of fairness underlying the Takings Clause," *Eastern Enterprises*, 524 U.S. at 537, and effects an unconstitutional taking.

II. The Federal Circuit's Decision Is Inconsistent With The Ordinary Principles of Contract Construction Employed By This Court in *United States v. Winstar Corp.*

The Court should further grant the Owners' petition because, by following *Cienega Gardens*, the Federal Circuit adopted a fundamentally flawed methodology for interpreting complex, multiparty government contracts and turned a blind eye to the government's own admissions regarding the existence of a contract between itself and the owners.

By viewing each document in isolation, instead of as part of an integrated whole, the Federal Circuit failed to give effect to the intentions and expectations of the parties. The panel's formalistic approach to contract interpretation is flatly inconsistent with well-established rules reaffirmed by this Court in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), and by the Federal Circuit itself *in banc* in *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995).

Like this case, *Winstar* involved a circumstance in which the federal government required the assistance of private parties to accomplish an important public endeavor; in that case, the rescue of the failing savings and loan industry. 518 U.S. at 844-48. Lacking the funds to resolve the savings and loan crisis directly, the government enticed healthy savings and loans to acquire failing thrifts with the promise of favorable regulatory treatment. *Id.* at 847-48. This favorable treatment included allowing the healthy thrift to count goodwill from the acquisition as capital for purposes of federal solvency regulations, allowing the thrifts to amortize the goodwill over a 40-year period, and allowing the thrift to count cash received from the government both as an intangible and as a tangible asset. *Id.* at 850-53.

When this policy failed to resolve the savings and loan crisis, Congress enacted a new statute that drastically altered federal regulation of the savings and loan industry, including eliminating the favorable regulatory treatment that the federal government had promised to allow. *Id.* at 856-58. In the resulting litigation, the government argued, as it argued here, that its promise of favorable regulatory treatment "simply reflect[ed] statements of then-current federal regulatory policy rather than contractual undertakings." *Id.* at 862

(plurality opinion). This Court rejected that argument, finding "unconvincing" the government's suggestion "that the parties meant to say only that the regulatory treatment laid out in these documents would apply as an initial matter, subject to later change at the Government's election." *Id.* at 909-10 (plurality opinion); *see also id.* at 919 (Scalia, J., concurring in the judgment) ("I agree with the principal opinion that the contracts at issue in this case gave rise to an obligation on the part of the Government to afford respondents favorable accounting treatment.").

Although *Winstar* and this case both involve incentives offered by the government to induce private parties to participate in government transactions memorialized by a series of contemporaneous, interlocking writings, the Federal Circuit in *Cienega Gardens* refused to apply *Winstar* to the facts of this case. *Cienega Gardens*, 194 F.3d at 1245-46. The panel sought to distinguish *Winstar* because of the presence in that case of "integration clauses that expressly incorporated contemporaneous documents that allowed" the thrifts to receive favorable regulatory treatment. *Id.* Although the deed of trust note and its rider containing the prepayment provision are "contemporaneous documents," the *Cienega* majority held that they could not bind the government because they were not "expressly incorporated" into a document to which Petitioners and HUD were formal parties. *Id.*

The *Cienega* majority fundamentally misread *Winstar*. The Supervisory Assistance Agreements (SAAs) that were at issue in *Winstar* did *not* expressly incorporate the promise of favorable regulatory treatment. Rather, each SAA contained an integration clause which prohibited consideration of other documents except for Bank Board

resolutions referencing the regulatory forbearances. The Bank Board resolutions stood in the same position *vis-à-vis* the SAAs as the deed of trust notes in this case stand *vis-à-vis* the regulatory agreement, which contains no integration clause.

Contrary to the *Cienega* court's view, moreover, while an express incorporation provision "often makes clear precisely what documents constitute a contract," it is not a precondition to an integrated consideration of contemporaneously-executed documents. *California Fed. Bank v. United States*, 39 Fed. Cl. 753, 773 (1997); *see also id.* at 774. ("Mutuality of intent, even in the context of written contracts, may be established by several contractual instruments as opposed to one superseding document. . . . Contracts are frequently found to exist despite the absence of an integrating document."). Until this decision, even the government rejected the notion that "the presence of an explicit, integrated contract is the *sine qua non* of governmental contractual liability."[12]

Further, although the SAAs' integration clauses were relevant in *Winstar*, the *Winstar* plurality indicated that, even absent such clauses, reference to the overall facts and circumstances of the transaction would have led to the same result. *Winstar*, 518 U.S. at 863 ("To the extent that the integration clause leaves any ambiguity, . . . the realities of the transaction favored reading those documents as contractual commitments.") (plurality opinion). In this case, by declining to consider the overall facts and circumstances and the "realities of the transaction," the Federal Circuit

12. *See* Defendant's Request for Certification of an Interlocutory Appeal, filed on June 17, 1990 in *Suess v. United States*, No. 90-981C (Fed Cl.), at 6.

failed to give effect to the parties' intent. *See The Binghamton Bridge Co.*, 70 U.S. (3 Wall.) 51, 76 (1865) ("[I]t should never be lost sight of, that the main canon of interpretation of a contract, is to ascertain what the parties themselves meant and understood.").

Had the *Cienega* majority adhered to the reasoning of *Winstar*, it would have found that the documents here, as in *Winstar*, evidence the parties' intent to bind the government contractually; to the extent the documents leave "any ambiguity," the "realities of the transaction" would have resolved those ambiguities in Petitioners' favor. 518 U.S. at 863 (plurality opinion). The realities are that the undisputed purpose of "the 20-year lock-in period" was "to get [for-profit developers] involved in the program, . . . to try and convince them to get in the program." *Loss of Subsidized Multifamily Housing Units* at 18.

As noted above, Congress knew full well that the "specific object" of ELIHPA and LIHPRHA was to "abrogat[e]" the government's contractual promise to allow developers to prepay their insured mortgages after 20 years and exit the HUD program.[13] *See Winstar*, 518 U.S. at 900 (plurality opinion); *see also id.* at 924 (Scalia, J., concurring in the judgment and observing that "Congress specifically set out to abrogate the essential bargain of the contracts at issue"). Congress enacted ELIHPA and LIHPRHA not because it determined that the government had not made a prepayment promise, but because it concluded that the

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13. Petitioners respectfully submit that this Court's opinion in *Marathon Oil Co. v. United States, No. 99-253, cert. granted*, 120 S. Ct. 494 (1999), argued on March 22, 2000, may impact its decision in this case.

interests of low-income tenants outweighed the government's contractual commitments. *See, e.g.*, H.R. Rep. No. 101-122(I), at 37 (1987); H.R. Conf. Rep. 101-625, at 458 (1990).

No one has ever disputed in this case that the government purposefully provided the developers the option of early prepayment in order to entice them to participate in HUD's low-income housing program. The language governing prepayment in the Deed of Trust Note was required and "supplied by HUD" and effectively tracked the rule established in contemporaneous HUD regulations.[14] HUD has admitted frankly that it provided the developers a 20-year contractual prepayment right "to get [developers] involved in the program, . . . to try and convince them to get in the program."[15] In his declaration, Mr. Lawrence Burke provided uncontradicted testimony that he paid premiums for sites in middle class neighborhoods and maintained the buildings with the same care as his conventional rentals in reliance on the government's promise that he could prepay the mortgages and convert the properties to conventional rentals after 20 years.[16]

Indeed, before the commencement of litigation arising out of the enactment of ELIHPA and LIHPRHA, no one disputed that the government's prepayment promise was a contractual commitment between the government and the developer. Congress certainly knew that ELIHPA and LIHPRHA would breach the government's prepayment promise to the

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14. *See* 24 C.F.R. §§ 221.524(a)(ii);-236.30(a)(i) (1970).

15. *Loss of Subsidized Housing Units* at 18.

16. Fed. Cir. J.A. at 129.

developers.[17] With respect to the prepayment issue, HUD Secretary Jack Kemp testified before Congress that the government had a duty to fulfill the "commitment to the contract that we entered into with people."

As noted by Judge Rader, as recently as February 1997, HUD itself has argued in federal court that the proper way to interpret the interlocking documents involved in this case is to construe the "regulatory agreement . . . in the context of its role in effectuating a program under the National Housing Act and with regard to the documents that together comprise the loan transaction, specifically the mortgage instruments."[18]

Despite universal acknowledgement of the importance of Petitioners' prepayment rights in the overall scheme of the transaction, in following *Cienega Gardens*, the Federal Circuit concluded those rights were not enforceable against HUD. While HUD is undisputedly a named party to the Regulatory Agreement, the Federal Circuit reiterated that the Regulatory Agreement did not "mention prepayment of the mortgage loan or incorporate any agreement or provision addressing prepayment." App., *infra*, 12a. As a result, the panel concluded that the documents unambiguously evidenced separate agreements between distinct parties. *Id.*

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17. *See, e.g.*, H.R. Rep. No. 122(I), 100th Cong., 1st Sess. 37 (1987) (discussing "contract rights of owners"); 133 Cong. Rec. S11,241 (daily ed. Aug. 4, 1987) (statement of Sen. D'Amato); 136 Cong. Rec. S14,089, S14,094, S14,100-01 (daily ed. Sept. 27, 1990) (statement of Sen. Armstrong).

18. United States' Memorandum in Opposition to the Defendants' Motion for Summary Judgment, filed on Feb. 24, 1997 in *United States v. David*, No. 94-7191 (E.D. Pa.), *infra*, at 79a-99a.

By construing the deed of trust note and its rider as an agreement only "between the relevant [Petitioner] and its private lending institution," App., *infra*, 13a, the Federal Circuit ignored the entire context of the instrument: HUD required the prepayment provision in the rider to the deed of trust note *for its own benefit*, to ensure that it had the right under the regulatory agreement to require Petitioners to remain in the low-income housing program for at least 20 years and to induce Petitioners – with an assurance respecting prepayment — to enter into the regulatory agreements in the first place. The panel's decision effectively treats HUD as a stranger to the note and its rider, even though the language was drafted by HUD, the sole purpose of the rider was to allocate rights and obligations between the plaintiffs and HUD, and HUD's approval of the note and its rider was a specific condition to HUD's offer as expressed in the Commitment.

Yet such a conclusion is irrefutably contrary to the position taken by the government where it was to the government's benefit to argue that the various constituent documents in each transaction did not stand alone. In the *David* litigation discussed above, the government was seeking to recover monies that it alleged had been improperly distributed to the owners of a housing project insured by the government under § 207 of the National Housing Act ("NHA") — exactly *the same section* under which the government insured the § 221(d)(3) and § 236 programs at issue in the case before this Court.[19]

19. The specific co-insurance program at issue in *David* is regulated by § 244 of the NHA. However, § 244 was not a source of authority for HUD to insure a mortgage. "It simply allowed HUD to enter into a contract of coinsurance for any mortgage which was (Cont'd)

In support of its claim, the government made the following arguments in its Memorandum In Opposition To The Defendants' Motion For Summary Judgment:

- The terms of a contract must be "interpreted as a whole" and "[a]ll writings forming part of the same transaction must be construed together." App., *infra*, 87a.

- "The regulatory agreement must be construed in the context of its role in effectuating a program under the National Housing Act *and with regard to the documents that comprise the loan transaction, specifically the mortgage instruments*." *Id.* at 82a.

- The mortgage lender (who entered into the notes and mortgage agreements with the owners) was really simply "performing a number of functions performed by HUD in administering the loans [that] were delegated to the mortgage lender," and simply relieved HUD of "the burden of running the insured loan programs." *Id.* at 89a.

- "The regulatory agreement is the *quid pro quo* for HUD's endorsement of the note for insurance." *Id.* at 93a.

- "[U]nder the regulatory scheme, the rights and obligations between HUD and the beneficiary of HUD financing are reciprocal and coextensive in duration. As signatories to the regulatory agreements, the defendant owners were constructively on notice of this." *Id.* at 89a.

(Cont'd)
otherwise eligible for insurance pursuant to some other section of the National Housing Act. . . ." App., *infra*, 89a. As a result, participants in both the § 244 and § 221(d)(3) and § 236 programs executed almost identical documents with almost identical provisions, including a Mortgage, Mortgage Note, and Regulatory Agreement.

In short, the very arguments made by the government in *David* are the same arguments that have been advanced by Petitioners, rejected by the panel, and disavowed by the government in this case. Those mainstream canons of contractual construction require that the Regulatory Agreement be construed together with the other documents (the Commitment for Insurance of Advances, the Deed of Trust and the Note) that demonstrate the parties' intent to be bound by the owners' 20-year prepayment rights (through the Note and by reference to the regulations then in effect).

In addition to its contractual construction arguments, the government insisted in *David* that the regulations *in effect at the time the mortgage was entered into* should control the rights and obligations of the parties under such contracts. *Id.* at 93a-94a. This argument is consistent with the position taken by the government at all times prior to the institution of this litigation,[20] as well as with the plain language of the documents themselves.[21] Specifically, HUD's endorsement on the Note in this case was made pursuant to the provisions of the NHA and the regulations thereunder in effect *on the*

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20. *See* Fed. Cir. J.A. at 138 (letter from HUD to a developer seeking prepayment stating that "the HUD regulations that govern the mortgage insurance contract for the project are those in effect on the date the mortgage note was initially endorsed for insurance.")

21. As Judge Archer observed in *Cienega Gardens*, one such document, the Commitment for Insurance of Advances, was an offer by HUD, under the provisions of [Section 221(d)(3) or Section 236, as the case may be] the National Housing Act, and the *regulations then in effect* to insure a deed of trust note between the Appellants and the lender upon their satisfaction of specified conditions. *Cienega Gardens, et al. v. United States*, 194 F.3d at 1250 (Archer, J. dissenting).

date that HUD endorsed the mortgage, a date that the government manually typed in before endorsing the Note. Those regulations, as previously briefed, included the 20-year prepayment right. By adopting the regulations *then in effect* into its endorsement of the Note, the government did not merely promise to apply its regulations as they might change from time to time, but instead relinquished its right to change the terms of the contract by amending those regulations as to the contracting parties. As the panel observed, it is undisputed that those regulations permitted prepayment of HUD-insured mortgages after twenty years from the date of final endorsement. 24 C.F.R. § 221.524, 236.30 (1970).

Given the context of these transactions and the demonstrated evidence of *both* parties' intent, there can be no doubt that if the contracts at issue here were between private parties, little of the Court's time would be wasted in holding the party in the position of HUD liable for breach of contract. As such, Petitioners submit that the Federal Circuit, in following the decision in *Cienega Gardens* despite the introduction of the government's contrary admissions in the *David* litigation, ignored mainstream canons of contractual construction.

CONCLUSION

The Federal Circuit's decision in this case involves legal issues of fundamental importance to this Court, and calls into question the contractual and property rights of hundreds of private parties who entered into partnership with HUD to build and operate this nation's low-income housing. Unless this decision is reversed, it will give the government *carte blanche* to not only renege on its promises to these parties despite proclaiming in other venues that these promises must be upheld, but also to appropriate without penalty the property rights of those entities in partnership with the government. As a result, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED OCTOBER 4, 1999

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-5111

GREENBRIER, WOODLAKE VILLAGE PARTNERSHIP, CARRIER ARMS APARTMENTS, LTD., COLONIAL TERRACE APARTMENTS LTD., FIRST BROOKWOOD, LTD., FIRST BUENA VIDA, LTD., FIRST FAIRMONT II, LTD., FIRST PLAZA DORADO LTD. PARTNERSHIP, FIRST VILLAGE WEST LTD. PARTNERSHIP, FIRST PLAZA HILLS EAST LTD. PARTNERSHIP, HIGH HOUSE VILLAGE APARTMENTS, LTD., HILLCREST APARTMENTS LTD., JACKSON MANOR APARTMENTS, LTD., SKYLINE FOX HOLLOW JOINT VENTURE, SOUTH PARK APARTMENTS, LTD., SOUTHSIDE VILLAGE APARTMENTS, LTD., FIRST PARKWOOD LTD. PARTNERSHIP, AMERICAN RIVER LTD. PARTNERSHIP, ASPEN MANOR, BEAR MOUNTAIN VILLAGE, CAMELOT NORTH COMPANY, CAMELOT SOUTH COMPANY, CANYON APARTMENTS COMPANY, CASCADE TERRACE LTD. PARTNERSHIP, COTTONWOOD MANOR COMPANY, ELLENDALE ARMS APARTMENTS, ESCONDIDO PARK APARTMENTS, FOOTHILL GARDENS, LTD. PARTNERSHIP, HOLLISTER PLAZA LTD., IMPERIAL VILLA APARTMENTS, LA VERNE TERRACE LTD. PARTNERSHIP, LAUREL CANYON TERRACE, MEYLER PARK APARTMENTS, MILLER AVENUE

Appendix A

APARTMENTS, NAPA PARK LTD., ONTARIO TOWNHOUSES, PALMDALIA LTD. PARTNERSHIP, QUEEN ANN INVESTMENT COMPANY, ROSE GARDENS HOUSING LTD., SANTA CLARA TERRACE COMPANY, TEMPE APARTMENTS, A LTD. PARTNERSHIP, TEMPE GARDEN I, C.A. HOBBS, JR., LAURYCE G. HOBBS, CHARLES L. ADRIAN, SOUTHBROOK GARDEN APARTMENTS, LTD., SUGAR GROVE SQUARE, LTD., HUGH V. SMITH ENTERPRISES, INC. AND FIRST FAIRMONT TERRACE, LTD.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: October 4, 1999

Before MAYER, *Chief Judge*, LOURIE, and RADER, *Circuit Judges*.

Opinion of the court filed by *Circuit Judge* LOURIE. Concurring opinion filed by *Circuit Judge* RADER.

LOURIE, *Circuit Judge*.

Greenbrier et al. (the "Owners") appeal from the decisions of the United States Court of Federal Claims

denying them class certification, *see Greenbrier (Lake County Trust Co. No. 1391) v. United States*, No. 96-326C (Mar. 7, 1997) and granting summary judgment in favor of the United States on the Owners' breach of contract and takings claims, *see Greenbrier (Lake County Trust Co. No. 1391) v. United States*, 40 Fed. Cl. 689 (Fed. Cl. 1998). Because the trial court correctly determined that the United States was not in privity of contract with the Owners and therefore could not be held liable for breach of such contracts, and correctly determined that the Owners' takings claim is not ripe for review, we affirm its grant of summary judgment against the Owners and its dismissal of their complaint. In light of these holdings, the petition for class certification is moot.

BACKGROUND

Greenbrier et al. are 249 low-income housing Owners who allege that they each secured the contractual right from the United States to prepay without its approval their government-insured mortgage loans after 20 years and that Congress's enactment of the Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA")[1] and the Low-Income Housing Preservation and Resident Homeownership Act of 1990 ("LIHPRHA"),[2] both of which required that the Owners obtain permission from HUD before prepaying their mortgage loans, breached their contracts. The

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1. Pub. L. No. 100-242, Title II, 101 Stat. 1877 (1987) (pertinent parts reprinted in 12 U.S.C. § 1715*l*note (1989) (Preservation of Low Income Housing)).

2. Pub. L. No. 101-625, Title VI, § 601(a), 104 Stat. 4249 (1990) (codified at 12 U.S.C. §§ 4101-47).

Owners alternatively argue that such statutory enactments gave rise to a taking of their properties, entitling them to just compensation. The Owners also seek to be certified as a class.

The breach of contract claim asserted by the Owners in this case is identical to that asserted by the low-income housing owners in *Cienega Gardens v. United States*, 162 F.3d 1123 (Fed. Cir. 1998). The only difference between this case and *Cienega Gardens* is that this case also presents takings and class certification issues. Because the background facts relating to the issues in this case are indistinguishable from those involved in *Cienega Gardens*, only a simplified description of the parties' agreements and the regulatory scheme is set forth herein, a more exhaustive description being set forth in that opinion.

In the 1960s and 1970s, pursuant to two National Housing Act programs referred to as "Section 221(d)(3)"[3] and "Section 236,"[4] the Owners entered into agreements with the Department of Housing and Urban Development ("HUD") and private lending institutions for the purpose of financing the construction of low- and moderate-income public housing projects. In return for submitting to certain HUD regulation of their housing projects, the Owners each benefited from mortgage insurance and low-interest mortgage loans.[5] At issue in this case is whether the Owners

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3. *See* 12 U.S.C. § 1715*l*(d)(3) (1994).

4. *See id.* § 1715z-1 (1994).

5. An Owner participating in the Section 221(d)(3) program paid below-market interest rates on its mortgage loan. *See id.*

(Cont'd)

contracted with the United States for particular mortgage loan prepayment rights and whether Congress's enactment of ELIHPA and LIHPRHA, which restricted mortgage loan prepayments, breached such contractual rights. Also at issue is whether the Owners' claim that these statutes effected a taking of their properties is ripe for review and whether the trial court abused its discretion by denying them class certification.

Each of the Owners executed substantially similar sets of contracts with the United States and the lenders. First, a lender and an Owner submitted to HUD an application for insurance of a mortgage loan for a property on which a low- or moderate-income housing project would be constructed. The application had to comply with certain eligibility requirements, terms, and conditions prescribed by HUD. *See* 12 U.S.C. §§ 1715*l*(b), 1715z-1(j) (1994). The Federal Housing Commissioner, acting on behalf of the Secretary of HUD, thereafter gave the lender and Owner a "Commitment for Insurance of Advances" wherein it promised to endorse for insurance a 40-year mortgage note in a specified amount, "subject to compliance with the requirements of the Regulations, the terms and conditions set forth below, and the attached specified conditions, if any." The commitment specified certain mortgage loan payment terms and stated that certain documents relating to the construction project and its financing, including the mortgage and note, were to

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(Cont'd)

§ 1715*l*(d)(5) (1994). Under the Section 236 program, the United States made interest reduction payments to a lender, on behalf of an Owner, which resulted in the Owner paying as little as 1% interest on its mortgage loan. *See* 12 U.S.C. § 1715z-1(c) (1994).

be submitted to HUD for approval. The commitment did not specify any prepayment terms, but it did state that "[a]ll forms, certificates, documents and agreements called for by this commitment shall be upon forms approved or prescribed by the Commissioner and shall be completed, executed and filed . . . in such manner as he shall prescribe."

After receiving commitments for insurance, the Owners and lenders executed substantially similar 40-year mortgage notes and mortgages on the subject properties. Although some Owners executed notes that did not permit prepayment at any time without the Commissioner's consent, the notes (or riders thereto) generally allowed prepayments without prior HUD approval "after 20 years from the date of final endorsement of this note by the Federal Housing Commissioner," provided the Owner was a "limited distribution entity."[6] HUD did not sign the notes. The mortgages each incorporated by reference the mortgage note and a Regulatory Agreement (*see infra*) between HUD and the Owner, and provided that upon the Owner's default, under the Regulatory Agreement and upon the Federal Housing

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6. The prepayment terms reflected contemporaneous HUD regulations governing the two programs. The regulations then in effect provided that the mortgage insurance contract (and thus HUD's regulation) could be terminated either by prepayment in full of the mortgage loan or by a joint request from the lender and owner evidencing a "voluntary agreement" to terminate the mortgage insurance. *See* 24 C.F.R. §§ 207.253, 221.524(a)(ii), 236.30(a)(I) (1973). The regulations also stated that they were subject to amendment at any time, with the proviso that such amendments would not adversely affect the interests of a *lender* (but not an owner) under a preexisting insurance contract. *See id.* §§ 221.749, 236.249 (1973).

Commissioner's request, the lender had the option to declare the whole of the indebtedness due and payable.

On or about the same dates as the notes and mortgages were signed, the Owners and HUD also executed virtually identical Regulatory Agreements that set in place low-income affordability restrictions for the subject properties. These agreements each stated that, in consideration of the Commissioner's endorsement of the note for insurance, the Owner agreed to comply with applicable statutes and regulations and to follow various rules concerning the operation and management of the project for as long as the contract of mortgage insurance was in effect. These rules included restrictions on the rate of return that an Owner could receive from the project and restrictions on the rental rates it could charge the tenants. The Regulatory Agreements did not contain any provisions regarding prepayment of the mortgage notes. HUD thereafter endorsed each note to indicate its insurance commitment to the lender and entered into a separate mortgage insurance agreement with that lender.

The agreements can thus be summarized as follows: Each Owner agreed with HUD to submit to its regulation for as long as HUD insured the Owner's 40-year note. In return for the lender's financing, the Owner promised the lender not to prepay its mortgage loan for at least 20 years without HUD's approval, and also agreed to comply with the Regulatory Agreement that it had entered into with HUD. Each of the Owners thereby bound itself to HUD's regulation (and therefore limited investment returns) for the duration of the loan.

Appendix A

In 1987, Congress became concerned that a large number of housing project Owners would prepay their mortgage loans, leave the housing programs to earn more money from their properties, and thereby reduce the supply of low-income rental housing. It therefore enacted ELIHPA, which placed a two-year moratorium on unconditional, unilateral prepayments of HUD-insured mortgage loans and required that an Owner obtain HUD approval before *any* prepayment, even after 20 years.[7] ELIHPA also authorized HUD to provide financial incentives to applicants who agreed to remain in the program.[8] When ELIHPA was enacted, some of the Owners were already entitled to prepay their mortgage loans under the terms of their notes because 20 years had passed since HUD endorsed the notes. Other Owners were not yet entitled to prepay their loans.

In 1990, Congress replaced ELIHPA with LIHPRHA, which continued ELIHPA's prepayment regulations and authorized HUD to grant the Owners numerous financial incentives in order to encourage them not to prepay their mortgage loans and to remain in the programs. *See* 12 U.S.C. § 4101-47. Thus, the Owners could not prepay their mortgage loans after 20 years without HUD approval, even though their notes permitted such prepayments. As a consequence of ELIHPA and LIHPRHA, the Owners had to overcome yet another hurdle in order to leave the federal housing program,

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7. *See* Pub. L. No. 101-242, § 221, 101 Stat. 1878-79. HUD's approval was conditioned on it making certain written findings regarding the prepayment's effect on existing tenants and the availability of low-income housing in the local area. *See id.*, § 225, 101 Stat. 1880.

8. *See id.* § 224, 101 Stat. 1880-01.

convert their properties into conventional rental or other properties, and earn higher returns on their investments.

In 1996, Congress enacted the Housing Opportunity Program Extension Act of 1996 ("HOPE").[9] Among other things, HOPE authorized low-income housing owners to prepay their mortgage loans without HUD's prior approval. That hurdle has thus now been removed.

None of the 249 Owners in this case ever sought permission to prepay their mortgage loans during the period when HUD's prior approval was required under ELIHPA and LIHPRHA (1988-1996). Many of them did apply to extend the affordability restrictions or to transfer their projects to qualified purchasers. *See Greenbrier*, Nos. 96-326C, -364C, -435C, and -697C, Declaration of Joseph Malloy at 4-6, attachment A (May 3, 1997). Since HOPE's enactment, a small number of the Owners have prepaid their notes; the vast majority have not, even though they are presently free to do so without HUD's approval.[10]

Greenbrier filed suit against the United States in the Court of Federal Claims shortly after HOPE's enactment in 1996. The case was consolidated with three others[11] and

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9. Pub. L. No. 104-120, § 2, 110 Stat. 834 (Mar. 28, 1996).

10. As of May 3, 1997, only 30 of the 249 Owners prepaid their mortgage loans and left the program under HOPE. *See* Declaration of Joseph Malloy at 6, attachment A.

11. *See Carrier Arms Apartments v. United States*, No. 96-364C (Fed. Cl.); *C.A. Hobbs v. United States*, No. 96-435C (Fed. Cl.); *American River Ltd. Partnership v. United States*, No. 96-697C (Fed. Cl.).

additional plaintiffs were also joined, making a total of 249 separate plaintiffs. Greenbrier also filed a motion for class certification. The court denied the motion, reasoning that "factual differences among individual Plaintiffs' claims may well serve to distinguish the putative contractually bargained-for-rights at issue here" and that the "determination of Plaintiffs' takings claims will require inquiry into the factual nuances of each individual case." *Greenbrier*, slip op. at 1-2.

The trial court subsequently granted summary judgment in favor of the United States on both the breach of contract and the takings claims and dismissed the Owners' complaint. *See Greenbrier*, 40 Fed. Cl. at 689. The court held that the United States could not be liable for breach of contract because neither the documents nor the context of the transactions indicated that HUD and the Owners were in privity of contract with respect to the prepayment terms found in the mortgage notes. *See id.* at 691, 700. The court also held that since the Owners did not secure such a contractual right from HUD, they could not state a takings claim premised on the theory that the government took such a right. *See id.* at 692, 701. The court stated that inasmuch as the Owners claimed that the government's enactment of legislation imposing restrictions on the use of their property gave rise to takings, their claim was not ripe for review. It reasoned that the legislation provided procedures for the Owners to apply to have the restrictions removed or modified, that none of the Owners claimed that they made such applications, and that a final decision by the government on such an application was necessary. *See id.* at 701-02.

The Owners timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (1994).

DISCUSSION

A. Breach of Contract Claim

In *Cienega Gardens* we outlined our standard of review with respect to the breach of contract claim:

> Under the Tucker Act, the Court of Federal Claims has jurisdiction over claims based on "any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1) (1994). We have stated that "[t]o maintain a cause of action pursuant to the Tucker Act that is based on a contract, the contract must be between the plaintiff and the government. . . ." In other words, there must be privity of contract between the plaintiff and the United States. The effect of finding privity of contract between a party and the United States is to find a waiver of sovereign immunity. Whether a contract exists is a mixed question of law and fact. Since the parties do not dispute the relevant facts, the privity issue reduces to a question of law, which we review *de novo*. Contract interpretation itself also is a question of law, which we review de novo.

Cienega Gardens, 162 F.3d at 1129-30 (internal citations omitted).

Appendix A

This court decided *Cienega Gardens* while the present appeal was pending. That case involved another group of low-income-housing owners who entered into the same National Housing Act programs and executed the same series of contracts with HUD and private lenders as the Owners in this case. The *Cienega Gardens* owners also claimed that they had secured a contractual right from HUD to prepay their mortgage loans after 20 years without HUD approval and that the United States breached such contracts by restricting such prepayments under ELIHPA and LIHPRHA.

In *Cienega Gardens* we held that the United States and the owners were not in privity of contract with respect to the notes' prepayment terms because (1) the Regulatory Agreements contained no provisions relating to prepayment and did not incorporate any such provision by reference; (2) HUD's endorsements for insurance of the mortgage notes did not make it a party to the prepayment terms contained in the notes or the riders thereto; and (3) the incorporation by reference of the notes and the Regulatory Agreements into the mortgages did not make HUD a party to those mortgages. *See Cienega Gardens*, 162 F.3d at 1132-33. After determining that the documents unambiguously evidenced separate agreements between distinct parties, we concluded that "the contract documents simply do not show privity of contract between the owners and HUD with respect to a right to prepay the mortgage loans after twenty years without HUD approval." *Id.* at 1133. We noted that the applicable regulations, which mirrored the prepayment terms found in the notes, further supported the conclusion that there was no privity of contract because they expressly stated that they were subject to amendment:

> [I]t would have been inconsistent for HUD to have entered into the Regulatory Agreement if the agreement fixed the prepayment rights of the Owners, in view of the express power to amend the . . . regulations at any time that was reserved to HUD, subject only to the caveat that [*lenders'*] interests not be adversely affected.

Id. at 1134 (emphasis added). Lastly, we stated that the fact that HUD was intimately involved in the contracts between the private lending institutions and the owners did not create a contractual relationship with respect to the prepayment rights. *See id.* Because we found no privity of contract, we held that the United States could not be liable to the owners for breach of contract by enacting ELIHPA and LIHPRHA. *See id.* at 1136.

Our holding in *Cienega Gardens* is dispositive of the issue concerning whether the Owners in this case were in privity of contract with the government with respect to the prepayment terms found in their mortgage notes. The facts in this case are indistinguishable. Each of the Owners here executed the same series of contracts with HUD and a lender, under the same National Housing Act programs, as the owners in that case. There are no material differences between the terms of the notes, Regulatory Agreements, and mortgages to which the Owners in this case were a party and the terms of the documents to which the *Cienega Gardens* owners were a party. Since we are bound by the *Cienega Gardens* holding, we affirm the trial court's determination that the United States was not in privity of contract with the Owners with respect to the prepayment terms found in their

mortgage notes and it is therefore not liable for breach of such contracts.[12]

B. Takings Claim

The Owners also appeal the trial court's dismissal of their takings claim on ripeness grounds. We review the question of ripeness *de novo*. *See Howard W. Heck & Assocs., Inc. v. United States*, 134 F.3d 1468 (Fed. Cir. 1998).

The Owners argue that their "unfettered rights to prepay their mortgages" were "vested property rights," that by enacting ELIHPA and LIHPRHA Congress made a final decision to take such "unfettered rights," and that their takings claim was therefore ripe for adjudication. The Owners argue that it is irrelevant that the statutes provided procedures for obtaining permission to prepay their mortgage loans because "[s]ubjecting appellants to such an administrative process itself deprives the Owners of their unfettered option to exit the regulatory program. There is no requirement that administrative remedies be exhausted. . . ." The Owners cite *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725

12. During oral argument, the Owners referred to a recently-filed brief by the United States in an unrelated case involving other low-income housing owners who entered similar National Housing Act programs and who entered into contracts with lenders and HUD similar to those in this case. The Owners argue that in that brief, the government admits to being in privity of contract with the Owners with regard to the mortgage notes' prepayment terms. We do not discern such an explicit admission in the brief. Moreover, this late-filed submission does not change the fact that we are bound by the holding in *Cienega Gardens*.

(1997), to support their argument that the takings issue was ripe. The Owners state that they do not challenge the validity of the statutes and only argue that the statutes deprived them of property rights. We thus only consider whether their claim that the legislation deprived them of their property is ripe for adjudication when they never sought HUD's approval to prepay their mortgage loans or were denied the right to do so.

The government responds that the Owners' takings claim is not ripe until HUD issues a final decision denying them prepayment, because ELIHPA and LIHPRHA did not prohibit mortgage loan prepayments altogether, but rather required Owners to apply to HUD for permission to prepay. The government argues that the Owners have not even alleged that they sought such permission, let alone that they were denied it.

As a preliminary matter, we understand the Owners to argue that they have suffered regulatory rather than physical takings, since they do not allege that the government physically occupied or destroyed their properties,[13] but rather that the prepayment rights in their mortgage notes were "vested property rights" that were "taken" by the legislation.

The Fifth Amendment provides in relevant part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4. Although the Supreme Court has stated that "[c]ontract rights are a form

13. "The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992).

of property and as such may be taken for a public purpose provided that just compensation is paid," *United States Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 19 n.16 (1977), it has also emphasized that a government's interference with contractual rights does not necessarily constitute a taking of their property:

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking. This is not to say that contractual rights are never property rights or that the Government may always take them for their own benefit without compensation.

Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223-24 (1986) (internal quotation marks and citations omitted); *see also Eastern Enters. v. Apfel*, 524 U.S. 498, __ (1998). For purposes of this appeal we thus accept, but do not decide, that the prepayment terms in the Owners' notes may constitute "property." Even if the Owners' mortgage

note prepayment terms are property rights and were affected by the government's actions, a taking need not have occurred.

"[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In order to successfully assert a regulatory takings claim, the Owners must establish two components: that the regulation has in substance "taken" their property by going "too far," and that any proffered compensation is not "just." *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *Suitum*, 520 U.S. at 734. Governmental regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). A regulation goes "too far" for purposes of the Fifth Amendment when it denies all economically beneficial or productive use of land. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992). However, "a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348; *Suitum*, 520 U.S. at 734. "[T]his is a question of degree — and therefore cannot be disposed of by general propositions." *MacDonald*, 477 U.S. at 348 (citing *Pennsylvania Coal*, 260 U.S. at 160). The Supreme Court has not provided any "set formula to determine where regulation ends and taking begins," but rather requires "essentially ad hoc, factual inquiries" as to the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. *See id.* at 348-49.

Appendix A

The Supreme Court "ha[s] ma[d]e it quite clear that the mere assertion of regulatory jurisdiction does not constitute a regulatory taking." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

> The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the [property owner] free to use the property as desired.

Id. at 126-27. *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 296-97 (1981). In *Hodel* the Court had earlier stated that the Surface Mining Act did not "categorically prohibit surface coal mining, it merely regulate[d] the conditions under which such operations may be conducted." It noted that "[t]here is no reason to suppose that 'mere enactment' of the Surface Mining Act has deprived appellees of economically viable use of their property." *Hodel*, 452 U.S. at 296-97. The Supreme Court subsequently held in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), that a property owner's facial challenge to a city rent control ordinance provision requiring a hearing officer to take into account the "hardship to a tenant" was not ripe for review because the property owner had not alleged that the provision had ever been applied. *See id.* at 9-10. Thus, the law is clear that a statute, regulation, or ordinance that provides for a government entity to make a discretionary decision as to the conditions of use of property cannot be found to have taken property upon enactment or

promulgation of the statute, regulation, or ordinance. Enforcement is required before one can determine the extent of any deprivation of the property. In contrast, when a statute affecting private property lacks any licensing or other administrative provisions permitting an agency to vary its regulatory activities under the statute, a takings claim may be ripe upon enactment of the statute. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

Before we can determine whether the Owners' takings claim in this case is ripe, we thus must examine the particular provisions of the statutes we are faced with in order to determine whether or not they necessarily foreclose economically viable use by the Owners or whether they provide for a discretionary decision permitting such use. The most relevant provisions in the statutes before us read as follows:

> § 221. General prepayment limitation.
>
> (a) Prior approval of plan of action. — An owner of eligible low income housing may prepay, and a mortgagee may accept prepayment of, a mortgage on such housing only in accordance with a plan of action approved by the Secretary of Housing and Urban Development under this subtitle.

12 U.S.C. § 1715*l*note (1994) (ELIHPA).

> § 4101(a) Prepayment and termination
>
> An owner of eligible low-income housing may prepay, and a mortgagee may accept prepayment

> of, a mortgage on such housing only in accordance with a plan of action approved by the Secretary under this subchapter or in accordance with section 4114 of this title. An insurance contract with respect to eligible low-income housing may be terminated pursuant to section 1715t of this title only in accordance with a plan of action approved by the Secretary under this subchapter or in accordance with section 4114 of this title.

12 U.S.C. § 4101(a) (Supp. 1997) (LIHPRHA). Examination of these statutes shows that neither statute denies an owner the ability to prepay its mortgage loan; rather, both statutes provide that an owner may prepay, albeit only in accordance with a plan of action approved by the Secretary. The clear implication is, therefore, that permission to prepay may be granted. ELIHPA and LIHPRHA both outline procedures and criteria for HUD to use in order to determine whether prepayment should be allowed. *See id.* §§ 1715*l*note, 4107-47; 24 C.F.R. §§ 248.101-248.183. HUD is expressly granted the authority to approve prepayment proposals. *See* 12 U.S.C. §§ 4108, 4114. In fact, HUD has approved prepayment proposals on three of the eight occasions on which such approval was sought. ELIHPA and LIHPRHA thus set up a scheme for regulating how and when mortgage notes may be prepaid. As such, both ELIHPA and LIHPRHA "merely assert regulatory jurisdiction" over the Owners' ability to prepay their mortgage loans. Their enactment cannot therefore constitute a taking of any property rights.

We next must consider whether the Owners' claim that the statutes, as applied, took their property rights is ripe for

adjudication. The Supreme Court has stated that for an "as applied" takings challenge to become ripe, the government entity charged with implementing the statute, regulation, or ordinance at issue must have reached a "final decision" regarding its application to the property at issue. *See Suitum*, 520 U.S. at 734; *MacDonald*, 477 U.S. at 348-49; *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This rule is "compelled by the very nature of the inquiry required by the Just Compensation Clause" because the factors applied in deciding a takings claim "simply cannot be evaluated until the administrative agency has arrived at a final definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson*, 473 U.S. at 190-91; *see also MacDonald*, 477 U.S. at 350 ("Whether the inquiry asks if a regulation has 'gone too far,' or whether it seeks to determine if proffered compensation is 'just,' no answer is possible until a court knows what use, if any, may be made of the affected property.").

This means that where a government entity provides procedures for obtaining such a final decision, a takings claim will not be ripe until the property Owner complies with those procedures.[14] *See Williamson County*, 473 U.S. at 186-88 (holding "as applied" takings claim not ripe where the

14. Since a taking is unconstitutional only when the government entity takes property and does not provide just compensation, the property owner must also utilize any prescribed procedures for obtaining compensation. *See Williamson County*, 473 U.S. at 186, 194. The Tucker Act, 28 U.S.C. § 1491, provides a forum for bringing taking claims against the United States. *See id.* at 195.

property owner never sought variances from the zoning ordinance); *Hodel*, 452 U.S. at 297 (same); *Agins*, 447 U.S. at 260 (holding property owner's challenge to application of zoning ordinance not ripe where it did not submit a development plan). The failure to follow all applicable administrative procedures can only be excused in the limited circumstance in which the administrative entity has no discretion regarding the regulation's applicability and its only option is enforcement. *See Suitum*, 520 U.S. at 738-40. The reason for this exception is that in such circumstances, no uncertainty remains regarding the impact of the regulation, *see id.* at 740, certainty being the basis for the ripeness requirement, *see, e.g.*, *MacDonald*, 477 U.S. at 348 ("It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property.").

None of the Owners in this case have alleged that they followed the procedures provided for obtaining HUD permission to prepay their mortgage loans, much less that they have received final decisions from HUD denying them such permission.[15] The enactment of the statutes did not constitute such final decisions. That HUD may have set a high hurdle by imposing stringent requirements for granting

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15. In their brief, the Owners claim that "the court ignored record evidence indicating that some of the Owners had, in fact, applied for permission to prepay." However, they do not assert that they applied for permission to prepay under ELIHPA or LIHPRHA, and they have not pointed to any record evidence substantiating such an assertion. The evidence before us only indicates that some of the Owners have prepaid their mortgage loans under HOPE's provisions.

such permission does not excuse the Owners' failure to seek such permission. Moreover, the hurdle does not appear to be as high as the Owners would have us believe. While they argue that such applications would be futile, it is undisputed, as we noted earlier, that HUD granted permission for the prepayment of the mortgage loans in three of the eight instances where such permission was sought.

The Owners cite *Suitum* to support their argument that their takings claim is ripe. *Suitum* does not help the Owners, however. In that case, as the Supreme Court pointed out, there was no question about how the regulations at issue applied to the land in question. *See Suitum*, 520 U.S. at 739. Moreover, the Court stated that the agency had no discretion to exercise over Suitum's right to use her land. *See id.* at 739-40. The facts of this case are quite different.

The trial court thus correctly held that the Owners' takings claim is not ripe for review; we therefore affirm its grant of summary judgment against the Owners and its dismissal of their complaint.

C. Class Certification

The Owners lastly appeal the trial court's order denying the certification of a class defined as all persons and entities who are entitled to exercise contractually bargained-for rights to prepay their HUD-insured mortgage loans, excepting those similarly situated owners with cases currently pending. This issue is moot in light of our holdings that the government is not liable to the Owners for breach of contract and that their takings claim is not ripe for review. We therefore need not consider the correctness of that order.

Appendix A

CONCLUSION

The trial court correctly determined that the United States was not in privity of contract with the Owners and therefore could not be held liable for breach of such contracts; we therefore affirm its grant of summary judgment against the Owners on its breach of contract claim. The trial court also correctly determined that the Owners' takings claim is not ripe for review; we affirm its grant of summary judgment against the Owners and its dismissal of their complaint. In light of our holdings that the government is not liable to the Owners for breach of contract and that their takings claim is not ripe for review, the petition for class certification is moot.

AFFIRMED

* * *

Appendix A

Rader, *Circuit Judge*, concurring.

Relying on *Cienega Gardens v. United States*, 162 F.3d 1123 (Fed. Cir. 1998), this court determines that the United States was not in privity of contract with the low-income housing owners. As in *Cienega Gardens*, this court detects no privity because the prepayment rights, which Congress unilaterally withdrew, appeared in mortgage agreements but not in regulatory agreements with the United States. During the present case, this court learned that the United States had argued before the United States District Court for the Eastern District of Pennsylvania that the regulatory agreements with the owners and the mortgage notes were a single transaction. *See* United States' Memorandum in Opposition to the Defendants' Motion for Summary Judgment, *United States v. David*, 1995 U.S. Dist. LEXIS (E.D. Pa.) (No. 94-7191). In my judgment, this revelation undermines this court's reliance on *Cienega Gardens*, which itself looks suspect in the context of the arguments the United States made in the Pennsylvania District Court.

In *David*, the United States claims that the defendant property owner violated the NHA regulations and the regulatory agreement between HUD and the owner by withdrawing funds from HUD-insured projects. In response to defendant's motion for summary judgment, the United States reveals its position on the NHA mortgage documents:

> "All writings forming part of the same transaction must be construed together." United States' Memorandum at 7, *David* (No. 94-7191).

> "The mortgage instruments support the United States' construction of the language of the regulatory agreements .... The rules of construction require the two documents be examined together to ascertain the parties' objective intent." *Id.* at 13-14.
>
> "The regulatory agreement is the *quid pro quo* for HUD's endorsement of the note for insurance." *Id.* at 15.
>
> "The regulatory agreement viewed in the context of its role in the mortgage insurance program, and the requirement that mortgages be regulated as evidenced by the regulations, must be construed to endure as long as HUD insures, coinsures, owns or holds, the mortgage." *Id.* at 16.

These statements in *David* cast a very different light on the United States' arguments that HUD did not intend to be bound by the terms of the mortgage agreements. Because *Cienega Gardens* governs in later cases on the same issue, I must concur in the judgment of this court unless revisited *en banc*.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

98-5111

GREENBRIER, WOODLAKE VILLAGE PARTNERSHIP, CARRIER ARMS APARTMENTS, LTD., COLONIAL TERRACE APARTMENTS LTD., FIRST BROOKWOOD, LTD., FIRST BUENA VIDA, LTD., FIRST FAIRMONT II, LTD., FIRST PLAZA DORADO LTD. PARTNERSHIP, FIRST VILLAGE WEST LTD. PARTNERSHIP, FIRST PLAZA HILLS EAST LTD. PARTNERSHIP, HIGH HOUSE VILLAGE APARTMENTS, LTD., HILLCREST APARTMENTS LTD., JACKSON MANOR APARTMENTS, LTD., SKYLINE FOX HOLLOW JOINT VENTURE, SOUTH PARK APARTMENTS, LTD., SOUTHSIDE VILLAGE APARTMENTS, LTD., FIRST PARKWOOD LTD. PARTNERSHIP, AMERICAN RIVER LTD. PARTNERSHIP, ASPEN MANOR, BEAR MOUNTAIN VILLAGE, CAMELOT NORTH COMPANY, CAMELOT SOUTH COMPANY, CANYON APARTMENTS COMPANY, CASCADE TERRACE LTD. PARTNERSHIP, COTTONWOOD MANOR COMPANY, ELLENDALE ARMS APARTMENTS, ESCONDIDO PARK APARTMENTS, FOOTHILL GARDENS, LTD. PARTNERSHIP, HOLLISTER PLAZA LTD., IMPERIAL VILLA APARTMENTS, LA VERNE TERRACE LTD. PARTNERSHIP, LAUREL CANYON TERRACE, MEYLER PARK APARTMENTS, MILLER AVENUE APARTMENTS, NAPA PARK LTD., ONTARIO TOWNHOUSES, PALMDALIA LTD. PARTNERSHIP,

Appendix A

QUEEN ANN INVESTMENT COMPANY, ROSE GARDENS HOUSING LTD., SANTA CLARA TERRACE COMPANY, TEMPE APARTMENTS, A LTD. PARTNERSHIP, TEMPE GARDEN I, C.A. HOBBS, JR., LAURYCE G. HOBBS, CHARLES L. ADRIAN, SOUTHBROOK GARDEN APARTMENTS, LTD., SUGAR GROVE SQUARE, LTD., HUGH V. SMITH ENTERPRISES, INC. AND FIRST FAIRMONT TERRACE, LTD.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in Case NO(S) 96-CV-326, 96-CV-364, 96-CV-435 and 96-CV-697

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

Appendix A

ENTERED BY ORDER OF THE COURT

DATED OCT 04 1999

s/ Jan Horbaly
Jan Horbaly, Clerk

ISSUED AS A MANDATE: JANUARY 3, 2000

APPENDIX B — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED AND FILED APRIL 9, 1998

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Nos. 96-326C,
96-364C, 96-435C, 96-697C

(Filed April 9, 1998)

GREENBRIER (LAKE COUNTY TRUST COMPANY NO. 1391), an Indiana General Partnership, *et. al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

National Housing Act of 1934, as amended, 12 U.S.C. §§ 1715*l*(d)(3), 1715z-1, privity of contract, federal incentives to private industry to construct and operate low to moderate income housing, no contractual promise concerning term of the government affordability restrictions; regulatory takings, ripeness, requirement to submit application, inapplicability of futility exception where no application has been made.

* * *

Appendix B

OPINION

MEROW, *Judge.*

Plaintiffs, 249 owners of low and moderate income housing, claim that they entered into contracts with the U.S. Department of Housing and Urban Development (HUD) whereby HUD agreed to provide mortgage insurance and other benefits to plaintiffs to facilitate the development of such housing in exchange for plaintiffs' promise to maintain affordability restrictions on that housing for 20 years. Plaintiffs argue that defendant breached those contracts when it enacted federal legislation which effectively extended those affordability restrictions beyond that 20-year time period. Alternatively, plaintiffs claim that this legislation gave rise to a taking under the Fifth Amendment to the U.S. Constitution. This matter is now before the court on dispositive motions. The principal issues raised by this claim are whether plaintiffs secured a contract right from defendant to terminate those affordability restrictions after 20 years, or, if not, whether defendant's extension of those affordability restrictions gave rise to a taking of property under the Fifth Amendment to the U.S. Constitution.

Plaintiffs base their contract claim upon the various documents pursuant to which the affordable housing properties at issue in this case were constructed and are now operated. Plaintiffs locate part of the purported contractual promise in their mortgage notes with private lenders which permit plaintiffs to prepay those government-insured 40-year notes after 20 years without HUD's consent. Plaintiffs locate the remainder of the purported promise in their regulatory

agreements with HUD whereby plaintiffs promised to maintain the affordability restrictions on their properties for as long as the government mortgage insurance was in effect. Although HUD did not sign the notes containing the prepayment term, plaintiffs claim that these documents together embody a three-party contract between HUD, the private lenders and plaintiffs, and that the 20-year prepayment term in the notes evidences plaintiffs' bargained for promise to maintain affordability restrictions for 20 years and HUD's promise to lift those restrictions at the expiration of that time period.

Plaintiffs conclude that defendant breached this term of the contract when it enacted federal legislation restricting plaintiffs' ability to prepay their mortgages after 20 years.

In the alternative, plaintiffs maintain that the federal legislation extending the affordability restrictions gave rise to the taking of a vested contract right to terminate the affordability restrictions after 20 years and to operate their properties free of federal regulation. In such a case, plaintiffs argue, the Fifth Amendment to the U.S. Constitution entitles them to an award of just compensation.

It is decided that plaintiffs did not secure a contract right from defendant to prepay their government-insured mortgages after 20 years as neither the relevant documents, nor the context of their execution, indicate that such a right was secured. While HUD had a contract of insurance with the private lenders to insure plaintiffs' mortgages, HUD was not a party on the notes containing the prepayment term, *see Housing Corp. of America v. United States*, 199 Ct. Cl. 705,

709, 468 F.2d 922, 924 (1972) (no privity of contract on document where government not identified as party to document); *National Leased Hous. Ass'n v. United States*, 32 Fed. Cl. 454, 460 (1994) (*NLHA III*) (same), *aff'd*, 105 F.3d 1423 (Fed. Cir. 1997) (*NLHA V*), and the regulatory agreement between HUD and plaintiffs did not incorporate the terms of the note. *See, e.g., Winstar Corp. v. United States*, 64 F.3d 1351, 1356 (Fed. Cir. 1995) (en banc) (*Winstar IV*) (binding government to term not contained in its agreement with plaintiff thrifts but present in contemporaneously executed documents where agreement expressly incorporated those documents). Moreover, the context of these transactions does not support the finding that HUD entered into a contract with plaintiffs with respect to prepayment. *See, e.g., United States v. Winstar Corp.*, __ U.S. __, __ & n.9, 116 S.Ct. 2432, 2445 & n.9 (1996) (*Winstar V*) (lack of provision for contested term in governing regulations supports finding of contractual agreement as to term); *Winstar IV*, 64 F.3d at 1536 (heavily negotiated context supports finding of contractual agreement as to contested term); *Winstar Corp. v. United States*, 21 Cl. Ct. 112, 115 (*Winstar I*) (underlying transaction irrational unless contested term was intended subject of contractual agreement).

Here, the prepayment term was prescribed by HUD regulations, those regulations noted that such terms were subject to amendment, and the underlying transactions between HUD and plaintiffs cannot be characterized as irrational or illogical absent a contractual agreement concerning prepayment. Neither the documentation nor the context of these transactions evince the "type of direct,

unavoidable contractual liability necessary to trigger a waiver of sovereign immunity . . . [which is] the inevitable result of finding privity of contract." *NLHA V*, 105 F.3d at 1435.

Even if plaintiffs and HUD enjoyed privity of contract with respect to the prepayment term, that term cannot be characterized as a promise by plaintiffs to maintain the affordability restrictions for a period of 20 years and a promise by HUD to lift those restrictions at the expiration of that 20-year time period. Notwithstanding plaintiffs' characterization of the prepayment term, at the time of the transactions plaintiffs had the right to terminate the government insurance, and thereby the affordability restrictions, without the consent of HUD at any time. 24 C.F.R. § 207.253 (1973) (providing for termination of mortgage insurance without HUD's consent by voluntary agreement of owners and lenders); *Johnson v. HUD*, 911 F.2d 1302, 1303 (8th Cir. 1990) (applying 24 C.F.R. § 207.253). Moreover, the prepayment term does not reflect an unmistakable promise by defendant to afford plaintiffs a particular course of future regulatory treatment. *See Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52-53 (1986) (*POSSE*) (waiver of sovereign immunity must be unmistakable); *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1579 (Fed. Cir. 1997) (unmistakability doctrine applies to breach of contract claim for damages).

As it is decided that plaintiffs did not secure a contract right from defendant to terminate the affordability restrictions, plaintiffs cannot state a takings claim on the theory that the federal legislation took such a contract right. While plaintiffs complaint may, however, be read to state a

claim that the federal restrictions on the use of their property gave rise to a taking of that property, *see Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), that claim is not ripe for review. *See Suitum v. Tahoe Reg'l Planning Agency*, __ U.S. __, 117 S.Ct. 1659 (1997). The federal legislation which forms the basis of plaintiffs' challenge at all times provided that plaintiffs could seek HUD approval to terminate or modify the affordability restrictions. While plaintiffs do not maintain that they have applied for such approval, they claim that they should be excused from doing so on the ground that such application would be futile. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n. 9 (1986). In particular, plaintiffs maintain that such application would be futile because they could not satisfy the stringent statutory criteria HUD was bound to apply to their termination requests.

Plaintiffs' reliance upon the futility exception to the ripeness requirements applicable to their takings claim is misplaced. The futility exception may be applied in certain situations to excuse a property owner from utilizing variance or other similar procedures after a government denial of a proposed use, but not to excuse a property owner from applying for permission to engage in the proposed use as an initial matter. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985) (requirement that person obtain permit before engaging in use of property does not take the property in any sense). Even were the futility exception applicable here, the fact that plaintiffs' prepayment requests would be evaluated pursuant to rigorous statutory criteria, without more, is not enough to render compliance with those procedures futile. *Heck v. United States*, 37 Fed.

Cl. 245, 252 (1997) ("[E]ven if plaintiff showed an objective probability of denial on the merits . . . the application process could not thereby be characterized as 'futile' . . . . A plaintiff cannot plead futility whenever faced with long odds or demanding procedural requirements."), *aff'd*, 134 F.3d 1468 (Fed. Cir. 1998).

Accordingly, since plaintiffs did not secure a contract right from defendant to terminate the affordability restrictions after 20 years, plaintiffs' motion for summary judgment on their breach of contract claim is denied, and defendant's motion on that claim is granted. Further, because plaintiffs did not apply to HUD as provided by law in order to determine whether and to what extent the affordability restrictions at issue in this case would be required to be retained under that law, defendant's motion for summary judgment on plaintiffs' takings claim is granted.

FACTS

Plaintiffs here, 249 owners of low to moderate income housing,[1] like the plaintiffs in *Cienega Gardens v. United*

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1. On October 20, 1997, plaintiffs moved to remove parties to case number 96-326C (Guarantee Loan and Real Estate Inc., Mayfair Apartments and Oakwood Terrace Apartments) from this case without prejudice pursuant to RCFC 41. While RCFC 41(a)(1) permits voluntary dismissal by the plaintiff without leave of the court at any time before service of the answer or a response (whichever occurs first), the rule provides that after that time "an action shall not be dismissed at the plaintiff's insistence save upon order of the court and upon such terms and conditions as the court deems proper." (Cont'd)

States, 33 Fed. Cl. 196 (1995) (*Cienega I*), *appeal docketed*, No. 97-5126 (Fed. Cir. 1997) and *Lurline Gardens Ltd. Housing Partnership v. United States*, 37 Fed. Cl. 415 (1997), base their contract and takings claims upon their participation in the federal housing programs authorized under section 221(d)(3) and section 236 of the National Housing Act of 1934 (NHA), as amended. 12 U.S.C. §§ 1715*l*(d)(3), 1715z-1. By these NHA programs, Congress aimed to increase the supply of low to moderate income rental housing by providing incentives to private industry to construct and operate such housing.

Congress did so under the NHA by authorizing HUD to enter into contracts of mortgage insurance with private lenders upon the application of lenders to HUD to insure a mortgage between those lenders and private developers and owners of such housing.[2] The government also provided

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The purpose of subsection (a)(2) "is to discourage, in appropriate cases, a voluntary dismissal without prejudice, which would permit a plaintiff to refile at a later time . . . with a consequent imposition on limited judicial resources." *MacDonald & Evans, Inc. v. United States*, 2 Cl. Ct. 325, 327 (1983). Accordingly, in view of the purpose of subsection (a)(2), and the fact that the dispositive motions in this case had been fully briefed and argued by October 20, 1997, plaintiffs' motion to remove the above-referenced parties is denied.

2. If HUD approved of that application, it would issue a "firm commitment" signifying that approval, and setting forth the terms and conditions under which the mortgage would be insured. 24 C.F.R. § 221.509(a)(3). When the conditions of the mortgage insurance commitment were met, the lender would return the

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interest reduction payments to the lenders on behalf of the owners. These government benefits effectively converted what would have been a market-rate mortgage on the owner's property into a 1% loan. In return for these benefits, the owners entered into regulatory agreements with HUD.[3] In the regulatory agreement, the owners promised to maintain affordability restrictions on the properties for as long as HUD's insurance continued in effect.[4]

(Cont'd)
commitment to HUD with its request for HUD's endorsement for insurance. HUD would then indicate its insurance of the mortgage by endorsing the credit instrument; that is, the deed of trust note. *See* 24 C.F.R. § 207.254(a) (1978).

3. There were three principal documents executed to effect the transactions at issue in this case: (1) a deed of trust note; (2) a rider to the deed of trust note containing the prepayment term; (3) and a regulatory agreement. As the rider to the deed of trust note containing the prepayment term was expressly incorporated into the note, all references to "note" herein refer to the note and the incorporated rider with its prepayment term. Plaintiffs aver that the purported contractual obligations reflected in the documents provided to this court are representative of all 249 plaintiffs in the above-captioned claim.

4. The standard language in these regulatory agreements between HUD and the owners read:

> In consideration of the endorsement for insurance by the Commissioner of the above described note . . . , and in order to comply with the requirements of Section 236 of the National Housing Act, as amended, and the Regulations adopted by the Commissioner pursuant

(Cont'd)

Appendix B

According to the regulations then in effect, the government's insurance, and thereby the affordability restrictions contained in the regulatory agreement, could be terminated in two ways:

> **§ 207.253 Termination by prepayment and voluntary termination.**
>
> All rights under the insurance contract and all obligations to pay future insurance premiums shall terminate on the following conditions:
>
> (a) *Termination by prepayment.* Notice of the prepayment in full of the mortgage or loan shall be given to the Commissioner, on a form prescribed by the Commissioner, within 30 days from the date of prepayment. The insurance contract shall terminate, effective as of the date of prepayment . . . .
>
> (b) *Termination by voluntary agreement.* Receipt by the Commissioner of a written request, by the mortgagor and mortgagee or lender for the termination of the insurance on the mortgage or

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(Cont'd)

> thereto, Owners agree . . . that in connection with the mortgaged property and the project operated thereon and so long as the contract of mortgage insurance continues in effect . . . [the owners shall maintain enumerated affordability restrictions].

E.g., Def. App. at 00140.

> loan, on a form prescribed by the Commissioner, accompanied by the original credit instrument for cancellation of the insurance endorsement and the remittance of all sums to which the Commissioner is entitled. The termination shall become effective as of the date these requirements are met . . . .[5]

24 C.F.R. § 207.253 (1973). If an owner and lender reached an agreement pursuant to section 207.253(b), HUD would terminate the insurance and the affordability restrictions contained in the owner's regulatory agreement. *See Johnson*, 911 F.2d at 1303.

As provided in section 207.253(a), the other avenue to terminating the mortgage insurance, and thereby the affordability restrictions, was to pay the underlying mortgage. Owners' ability to prepay such mortgages before the expiration of their 40-year term was also governed by HUD regulations:

> **236.30 Prepayment Privileges.**
>
> (a) *Prepayment in full* — (1) *Without prior Commissioner consent.* A mortgage indebtedness may be prepaid in full and the Commissioner's controls terminated without the prior consent of

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5. The "Commissioner" refers to the Federal Housing Commissioner, who was the head of the Federal Housing Administration (FHA), the original agency in charge of administering NHA programs. 24 C.F.R. §§ 200.1, 200.40 (1978). In 1965, the Commissioner's functions were assumed by the Secretary of HUD. 24 C.F.R. § 200.2.

> the Commissioner where the mortgagor is a limited distribution type and either of the following conditions is met:
>
> (i) If the prepayment occurs after the expiration of 20 years from the date of the final insurance endorsement of the mortgage, provided the mortgagor is not receiving payments from the Commissioner under a rent supplement contract executed pursuant to the provisions of §§ 5.1 et seq. of this title.
>
> (ii) If the prepayment occurs as a result of the sale of the project to a cooperative or private nonprofit corporation or association, provided the sale is financed with a mortgage insured pursuant to § 236.40(d).

The mortgage notes between the lenders and the owners effectively repeated this prepayment regulatory provision:

> The debt evidenced by this Note may not be prepaid either in whole or in part prior to the final maturity date hereof without prior written approval of the Federal Housing Commissioner except where . . . (2) The maker is a limited dividend mortgagor which is not receiving payments from the Commissioner under a rent supplement contract pursuant to Section 101 of the Housing and Urban Development Act of 1965, and the prepayment occurs after the expiration of 20 years from the date of final endorsement . . . .

E.g., Def. App. at 00156.

While the regulations assured the lenders that HUD would not modify the regulations in a manner which would adversely affect their interests under their insurance contracts with HUD, no such provision was made with respect to owners:

> **236.249 Effect of amendments.**
>
> The regulations in this subpart may be amended by the Commissioner from time to time, in whole or in part, but such amendment shall not adversely affect the interests of a mortgagee or lender under the contract of insurance on any mortgage or loan already insured and shall not adversely affect the interests of a mortgagee or lender on any mortgage or loan to be insured on which the Commissioner has made a commitment to insure.

See also 24 C.F.R. § 221.749 (identical language for section 221(d)(3) program).

Neither the notes between the lenders and owners, nor the regulatory agreements between the owners and HUD, prevented the lender and owner from mutually agreeing to terminate the mortgage insurance. Thus, if the owner could secure the consent of the lender, the owner could terminate the government-insurance, and thereby the affordability restrictions contained in the regulatory agreement, without the consent of HUD at any time.

As the 20-year prepayment date approached for many of these federally-financed affordable housing properties,

Appendix B

Congress became concerned that owner prepayments, and the accompanying termination of the affordability restrictions, could lead to a shortage of affordable housing. In order to forestall this possibility, Congress enacted the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). Pub. L. No. 100-242, title II, 101 Stat. 1877-86 (1988) (*reprinted at* 12 U.S.C. 1715*l* note (1994)). ELIHPA placed temporary restrictions on the ability of owners to prepay their government-insured mortgages while Congress considered this potential problem.

Under ELIHPA, owners seeking to terminate the affordability restrictions were required to file a notice of intent and plan of action with HUD so requesting. Congress provided that HUD could only approve such a plan of action if (1) it would not "materially increase economic hardship for current tenants" or "involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available" and (2) the "supply of vacant, comparable housing" would be sufficient to ensure that prepayment would not "materially affect" the availability of such housing for lower income families. 101 Stat. 1880. Congress also authorized HUD to offer owners who did not prepay additional financial incentives.

Retaining the essential features of ELIHPA, Congress replaced this temporary measure with the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA). Pub. L. No. 101-625, title VI, 104 Stat. 4249 (codified at 12 U.S.C. §§ 4101-4147 (1994)). LIHPRHA expanded the financial incentive features of ELIHPA, and required prepaying owners to provide

assistance for tenants displaced by the termination of the affordability restrictions. 12 U.S.C. § 4113(b)-(c). As a result of this legislation, eight properties in the section 221(d)(3) and 236 programs were the subject of prepayment requests. Owners of three of those eight properties have prepaid, withdrawing from these NHA programs. See Malloy Decl. ¶ 6.

Due to the excessive costs of LIHPRHA, attributed in large measure to the inefficiency of offering additional financial incentives to all owners regardless of intent to prepay, *see* H.R. Rep. No. 104-120, at 145 (1995) ("[T]he incentives being offered are awarded to owners who may have no intention of prepaying the mortgages. In general, in today's real estate market, the prospect of widespread prepayment is unlikely."), Congress enacted the Housing Opportunity Program Extension Act of 1996 (HOPE), Pub. L. No. 104-120, § 2, 110 Stat. 834 (March 28, 1996). HOPE provides that owners may prepay their mortgages without prior HUD approval, so long as the owners agree not to raise rents for 60 days.

Notwithstanding the enactment of HOPE, scores of owners brought suit in this court claiming that defendant, through the enactment of ELIHPA and LIHPRHA, breached its contracts with them by burdening their "unfettered right" to prepay the government-insured mortgages after 20 years, and thereby terminate the affordability restrictions contained in their regulatory agreements with HUD. This claim is currently the subject of a conflict of opinion within this court. In *Cienega I*, the court found that privity of contract existed between HUD and the owners as to the prepayment term,

33 Fed. Cl. at 210, relying primarily upon the Restatement principle that "all writings that are part of the same transaction are interpreted together." Restatement (Second) of Contracts, § 202. The court went on to rule that the enactment of ELIHPA and LIHPRHA gave rise to a breach of contract, rejecting the government's sovereign acts and unmistakability defenses to that claim. In *Lurline Gardens*, the court concluded that the Restatement had been misapplied in *Cienega I*, and found that no privity of contract existed between HUD and the owners with respect to prepayment rights. *Lurline Gardens*, 37 Fed. Cl. at 420. Accordingly, the court in *Lurline Gardens* found no breach.[6]

ANALYSIS

Plaintiff moves for summary judgment on the breach of contract claim, arguing that no genuine issues of material fact surround the resolution of their claim, and that judgment may therefore be entered as a matter of law. RCFC 56(c). Material facts are those which will significantly affect the

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6. The HUD programs at issue in this case have been the subject of several related claims in this court: *Alder Terrace, Inc. v. United States*, 39 Fed. Cl. 114 (1997) (dismissing breach of contract claim on statute of limitations grounds); *Cienega Gardens v. United States*, 38 Fed. Cl. 64 (1997) (*Cienega III*) (damages opinion on *Cienega I* and *Cienega II*); *Corby Homes Partnership v. United States*, 38 Fed. Cl. 204 (1997) (dismissing breach of contract claim brought by owners seeking incentives under ELIHPA and LIHPRHA); *Cienega Gardens v. United States*, 37 Fed. Cl. 79 (1996) (*Cienega II*) (granting summary judgment to new plaintiffs raising same breach of contract claim argued in *Cienega I*); *Anaheim Gardens v. United States*, 33 Fed. Cl. 24 (1995) (dismissing takings claim based upon HUD's delay in promulgating LIHPRHA regulations).

outcome of a suit under the substantive law that governs the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Defendant moves to dismiss the breach claim, and also moves for summary judgment on plaintiffs' takings claim on the ground that any such claim is unripe.

I. Breach of Contract Claim

Plaintiffs maintain that they entered into contracts with HUD whereby they agreed to construct and operate housing properties according to government affordability restrictions for 20 years in exchange for government insurance and other benefits which enabled the construction and operation of those properties. Plaintiffs locate this critical promise in the various documents pursuant to which their affordable housing properties were built and are now operated. Part of that promise, according to plaintiffs, is memorialized in the mortgage notes for the properties which allow plaintiffs to prepay those government-insured 40-year notes after 20 years. The remainder of that promise, plaintiffs maintain, is found in their regulatory agreements with HUD whereby plaintiffs promised to maintain the affordability restrictions on their properties for as long as the government insurance was in effect.

The effect of finding privity of contract between HUD and plaintiffs as to the prepayment term is to find a waiver of sovereign immunity. That is, since the Tucker Act provides a waiver of sovereign immunity from suit for a claim "based upon [an] express contract with the United States," 28 U.S.C. § 1491(a)(1) (1994), the result of finding privity of contract is to find an expression of a waiver of sovereign immunity.

NLHA V, 105 F.3d at 1435. As such waivers are to be narrowly construed, *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 399 (1976), such privity must be "a direct and unavoidable conclusion" under the circumstances of this case. *NLHA V*, 105 F.3d at 1435.

a. Background: Federal Housing Legislation

National housing policy has as its goal providing "a decent home and a suitable living environment for every American family." 42 U.S.C. § 1441. After courts struck early federal attempts to directly construct such housing for low to moderate income families,[7] Congress resorted to incentives in order to increase the supply of such housing. Congress targeted incentives both to states and their political subdivisions, 42 U.S.C. § 1437 (federal incentives to "assist the several States and their political subdivisions to remedy the . . . acute shortage of decent, safe, and sanitary dwellings for families of lower income"), and to private industry. 12 U.S.C. § 1715*l*(a) (federal incentives to "assist private industry in providing housing for low and moderate income families and displaced families").

Congress accomplished the first objective through section 8 of the United States Housing Act of 1937, as

7. Courts held that the federal government could not use the power of eminent domain to acquire the property necessary for the development of such housing because the provision of such housing was not a public purpose within the meaning of the Fifth Amendment. *E.g.*, *United States v. Certain Lands in Louisville, Jefferson County, Ky.*, 78 F.2d 684 (6th Cir. 1935), *cert. granted*, 296 U.S. 567 (1935), *appeal dismissed*, 297 U.S. 726 (1936).

amended, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437-1437aaa-7 (1994 & West Supp. 1998)). Section 8 authorized HUD to enter into contracts with local public housing authorities (PHAs) by which HUD would agree to finance the construction of such housing, and the PHA would agree to certain restrictions designed to maintain the property as low income housing:

> The Secretary may make annual contributions to public housing agencies to assist in achieving and maintaining the lower income character of their projects. *The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment.*

42 U.S.C. § 1737c(a)(1) (emphasis added); *see also* 42 U.S.C. § 1737g(a)(1)(A) ("The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment . . . ."). The local PHA would then enter into "housing assistance payments contracts" (HAPs) with private owners or developers of such housing. Only in the case where no local PHA was in existence in a given locale was HUD authorized to enter into HAP contracts directly with owners. 42 U.S.C. § 1437f(b)(1). Congress also prescribed the conditions under which the federal incentives would be granted, providing that a HAP contract between the PHA and owner would be required to include certain terms regarding the calculation and adjustment of rents. 42 U.S.C. § 1437f(c).

Congress accomplished the second objective of assisting private industry provide such housing by enacting the

housing programs at issue in this case. Through section 221(d)(3) of the National Housing Act of 1934, as amended, HUD was authorized to provide owners with below market-rate mortgages. Section 221(d)(3) was replaced by section 236 for mortgages entered into after 1968, and authorized HUD to make interest reduction payments to private sector lenders on behalf of owners, 12 U.S.C. § 1715z-1(a), and to insure such mortgages, 12 U.S.C. § 1715*l*(b), effectively converting the mortgage into a 1% loan:

> For the purpose of reducing rentals for lower income families, *the Secretary is authorized to make, and to contract to make, periodic interest reduction payments on behalf of the owner* of a rental housing project designed for occupancy by lower income families, *which shall be accomplished through payments to mortgagees* [lenders] holding mortgages meeting the special requirements specified in this section.

12 U.S.C. § 1715z-1(a) (emphasis added).

As in the case of the section 8 program, Congress provided that for a mortgage between a lender and owner to be eligible for section 236 assistance, the lender and owner would be required to meet certain conditions. 12 U.S.C. § 1715*l*. Congress also specified that under the mortgage, the owner would be subject to regulation:

> under Federal or State laws or by political subdivisions of States, or agencies thereof, or by the Secretary under a regulatory agreement or

> otherwise, as to rents, charges, and methods of operation, in such form and in such manner as in the opinion of the Secretary will effectuate the purposes of this section . . . .

12 U.S.C. § 1715*l*(d)(3).[8] Unlike in the section 8 program, however, Congress did not direct HUD to provide section 236 assistance directly to the owner by contract.

b. Privity of Contract

The question of when the government may be held contractually liable for transactions undertaken pursuant to these federal housing programs was first considered by the Court of Claims and this court in the section 8 context. In *Housing Corp.*, 199 Ct. Cl. 705, 468 F.2d 922, and more recently in *National Leased Housing III*, 32 Fed. Cl. 454, private owners brought breach of contract claims against the government based upon their HAP contracts with PHAs. Relying upon the fact that HUD was not identified as a party on the HAP contracts between the owners and the PHAs, the courts found that there was no privity of contract between

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8. The regulations similarly provided that:

> The Commissioner may regulate and restrict the mortgagor [owner] as long as the Commissioner is the insurer, holder or reinsurer of the mortgage. Such regulation or restriction may be in the form of a regulatory agreement, corporate charter or such other means as . . . [HUD] approves.

24 C.F.R. §§ 221.529, 236.1 (1973).

the owners and HUD, and therefore rejected the owners' breach claims. In so doing, both courts rejected the owners' arguments that privity between HUD and the owners on the HAP contract could be established on the ground that HUD drove the transactions at issue, that the HAP contract gave HUD certain rights and referenced agreements to which HUD was a party, or that HUD was intimately involved in the execution of the HAP contracts. *Housing Corp.*, 199 Ct. Cl. at 709, 468 F.2d at 924; *NLHA III*, 32 Fed. Cl. at 456-59.

In this claim, plaintiffs raise essentially the same arguments in an effort to overcome the fact that HUD is not identified as a party to the note upon which plaintiffs base their breach of contract claim. As in *Housing Corp.* and *National Leased Housing*, those arguments do not establish that plaintiffs were in privity with HUD on those notes and the prepayment term contained therein.

As noted above, in *Housing Corp.*, the Court of Claims considered whether HUD was in privity of contract with owners on HAP contracts executed between those owners and PHAs. Although HUD had the right to approve the contract between the PHA and the owner, and was intimately involved in aspects of its execution, the Court of Claims found that HUD was not a party to that contract. The court based this finding upon the first paragraph of the HAP contract between the PHA and the owners which identified only the PHA and owners as the parties: "This [paragraph] makes it rather clear who the parties are and [HUD] is not one of them." 199 Ct. Cl. at 709, 468 F.2d at 924. As in these claims, the mortgage notes at issue here simply identify the parties as the owner and the lender. HUD is not so named on the notes.

This court and the Federal Circuit had occasion to revisit this question in *National Leased Housing*. In those cases, the courts considered both the claims of owners who had entered into HAP contracts directly with HUD, *NLHA I*, 22 Cl. Ct. 649 (1991); *NLHA V*, 105 F.3d 1423, and the claims of owners who had entered into HAP contracts with PHAs. *NLHA III*, 32 Fed. Cl. at 456-59; *NLHA V*, 105 F.3d at 1435-37. Relying upon *Housing Corp.*, this court rejected the claims of those owners who had entered into HAP contracts with the PHAs on the ground that HUD was not a party to the HAP contracts. *NLHA III*, 32 Fed. Cl. at 459. The fact that HUD was intimately involved in the transactions at issue, that HUD had the right to approve of the HAP contracts, or that HUD had entered directly into HAP contracts with other owners, did not sway the court on the privity issue:

> The requirement for privity of contract has an important legal basis which plaintiffs do not seem to fully appreciate. It is fundamental legal tenet that the United States as sovereign is immune from suit except where it consents to be sued and that any such waiver of sovereign immunity must be narrowly construed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 399 (1976). Where the government enters a contract directly with a party, it expresses its intent to open itself to a suit by that party in this court under the Tucker Act because such a suit would unquestionably be 'upon [an] express contract with the United States.' 28 U.S.C. § 1491(a)(1).

32 Fed. Cl. at 460.

On appeal, the owners argued that language within the HAP contracts which referenced the contracts between HUD and the PHA, and which gave HUD certain discretionary rights under the HAP contracts between the owners and the PHAs, could be construed to make HUD a party to the HAP contract. *NLHA V*, 105 F.3d at 1435. The Federal Circuit rejected these arguments, finding that the facts of the case did not evince "the type of direct, unavoidable contractual liability necessary to trigger a waiver of sovereign immunity, the inevitable result of finding privity of contract." *Id.* at 1436. Neither HUD's role in encouraging the transactions, nor the interrelationships among the different contractual parties, could gloss over the fact that HUD was not a party on the HAP contract.

Much like *Housing Corp.* and *National Leased Housing*, in the instant circumstance HUD encouraged the transactions, had a contractual relationship with one party to the overall transaction, and the document sued upon contained references to agreements to which HUD was a party but did not itself denote HUD as a party.[9] While plaintiffs argue that

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9. Notwithstanding these similarities, the court in *Cienega I* rejected the applicability of *Housing Corp. and National Leased Housing* on the ground that:

> [T]he putative contractual arrangements [in those cases] did not contain an express written agreement similar to the regulatory agreement into which plaintiffs and the government have entered into in this case, nor did those cases involve an express written agreement analogous to the specific agreement here at issue, *i.e.*, the rider to the deed of trust note allocating prepayment rights between HUD and the plaintiffs.

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Winstar supports their argument that HUD was in privity with plaintiffs on the prepayment term despite the fact that HUD was not identified as a party on the note, *Winstar* supports defendant's claim that no such privity exists.

In *Winstar*, the plaintiff thrifts claimed to have secured the contract right from the government to particular accounting treatment in exchange for the thrifts' promise to acquire failing savings and loans. The instruments documenting the transaction included an explicit agreement between federal regulators and the thrifts, along with related government resolutions and letters. *Winstar V*, __ U.S. at __-__, 116 S.Ct. at 2448-49. Although the term providing the thrifts with the beneficial accounting treatment was contained in resolutions to which the thrifts were not parties, this court, the Federal Circuit and the Supreme Court were persuaded that the thrifts had secured a contract right from the government to the special accounting treatment. The courts based this finding upon two facts not present in this case.

(Cont'd)

Cienega I, 33 Fed. Cl. at 208. While it appears that there was no agreement to which both HUD and the section 8 owners were a common party that is analogous to the regulatory agreements in this case, the HAP contracts containing the disputed term are analogous to the notes and the prepayment term at issue here. The presence of the regulatory agreement in these cases detailing the applicability of HUD regulations to individual owners, without more, is not enough to dismiss the applicability of *Housing Corp.*, and the requirement of *National Leased Housing* that privity of contract be "direct" and "unavoidable." 105 F.3d at 1435.

First, the courts found that the thrifts had acquired the contract right to special accounting treatment from the government because the explicit agreements between the government and the thrifts included a clause providing that the contemporaneous resolutions and letters, including the resolution containing the special accounting term, were incorporated into that agreement. *Id.* at 2448-49; *Winstar IV*, 64 F.3d at 1540. Second, the courts found that the circumstances surrounding the transaction supported finding that provision of special accounting treatment was the subject of a contractual agreement between the government and the thrifts. *Winstar V*, __ U.S. at __, 116 S.Ct. at 2449; *Winstar IV*, 64 F.3d at 1542-43; *Winstar I*, 21 Cl. Ct. at 115.

Included among the circumstances the courts found indicative of that conclusion were the extensiveness of the negotiations between the thrifts and the government concerning the accounting standards, *e.g.*, *Winstar IV*, 64 F.3d at 1536 (detailing the negotiations in the Glendale transaction), the fact that the special accounting practices at issue were neither prescribed by statute or regulations, *e.g.*, *Winstar V*, __ U.S. at __ & n.9, 116 S.Ct. at 2445 & n. 9 (the treatment of accounting standards was the "subject of express agreements" between the parties not provided for in the governing regulations), and the fact that it would have been irrational for the thrifts to assume the risk of a regulatory change that would bring certain insolvency, *id.* at 2449 ("it would have been irrational in this case for Glendale to stake its very existence upon the continuation of current policies without seeking to embody those policies in some sort of contractual commitment"); *Winstar I*, 21 Cl. Ct. at 115 (securing contract protection for the accounting practices was

"critical because it was clear that without it no purchaser would have engaged in this transaction").

In this case, not only is there no provision within the regulatory agreements incorporating the note, but the circumstances surrounding the transaction do not resemble those involved in the *Winstar* litigation. Here, unlike the special accounting practices involved in that case, the prepayment term was prescribed by HUD regulations, those regulations provided that such terms were subject to amendment, and the underlying transactions between HUD and plaintiffs cannot be characterized as irrational or illogical absent a contractual agreement between HUD and plaintiffs concerning prepayment. As in the section 8 housing cases, HUD's role as embodied in the agreements by which the affordable housing properties at issue in this case were constructed and are now operated, without more, does not render HUD in privity with plaintiffs with respect to the prepayment term.

c. Meaning of Prepayment Term

Even were plaintiffs and HUD in privity with respect to the prepayment term, that term does not reflect the mutual promise concerning the length of the affordability restrictions plaintiffs ascribe to it. In particular, plaintiffs' claim that the term reflects their promise to maintain the affordability restrictions contained in the regulatory agreements for 20 years, and HUD's promise to lift those restrictions at the end of that period, would fail for two reasons. First, under the regulations then in effect, plaintiffs had the right to terminate those affordability restrictions at any time without

HUD's consent. Second, the prepayment term and the regulatory agreement together do not evince the government's unmistakable promise to insulate plaintiffs from a change in the law.

As noted earlier, termination of the government insurance, and thereby the affordability restrictions contained in the regulatory agreements, could occur without HUD's consent in one of two ways: prepaying the mortgage after 20 years, 24 C.F.R. § 236.30(a), or simply canceling that insurance upon mutual agreement of the owners and lenders. 24 C.F.R. § 207.253 (1973); *Johnson*, 911 F.2d at 1303. As plaintiffs had the right to terminate the government insurance, and thereby affordability restrictions, at any time without HUD's consent, it is improper to characterize the prepayment term as a promise by plaintiffs to abide by those restrictions for 20 years.

Nor may the prepayment term be read as an unmistakable promise by HUD not to regulate plaintiffs after 20 years. The unmistakability doctrine provides that "sovereign power . . . will remain intact unless surrendered in unmistakable terms." *POSSE*, 477 U.S. at 52-53. In *POSSE*, the Supreme Court applied this principle to reject California's claim that a termination provision in its agreement with the United States enrolling the state in the federal Social Security program was a contract right entitling the state to withdraw from that program. Finding that California's claim implicated the sovereign power to "implement a comprehensive social welfare program," *id.* at 51, the Court framed the legal context pursuant to which California's claim would be judged:

> In view of the purpose and structure of the Act, and of Congress' express reservation of authority to alter its provisions, courts should be extremely reluctant to construe § 418 Agreements in a manner that forecloses Congress' exercise of that authority. While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights and the concomitant duty to honor those rights, we have declined in the context of commercial contracts to find that a 'sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserved the right to exercise that power in' the contract. Rather, we have emphasized that *'[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'*

POSSE, 477 U.S. at 51 (emphasis added) (internal citations omitted).

Considering the claim in this legal context, the Court found that the termination provision of the agreement was not a contract right entitling California to withdraw from the program. The termination provision was not such a right, according to the Court, because the clause was prescribed by the governing law, was subject to amendment under that law, and was not a term over which the individual states had any bargaining power. *Id.* at 55.

Plaintiffs' claim here, as in *POSSE*, implicates the sovereign power to implement and ensure the success of a social welfare program by encouraging participation in that program. Furthermore, the purported contract term at issue here, like the term at issue in *POSSE*, was prescribed by regulation, was subject to amendment, and was not a term over which the individual owners had any bargaining power. 24 C.F.R. § 236.230 (prescribing prepayment provision); 24 C.F.R. §§ 221.749, 236.249 (reserving the right to amend the prepayment regulations).[10] In view of the regulatory provision enabling plaintiffs to terminate the affordability restrictions without HUD's consent at any time, and the lack of an unmistakable promise by HUD not to regulate plaintiffs after 20 years, it cannot be said that the prepayment provision reflects a contractual promise regarding the term of the affordability restrictions at issue in this case.

II. Taking Claim

The takings clause of the Fifth Amendment to the U.S. Constitution provides "[n]or shall private property be taken for public use without just compensation." U.S. Const. amend. V. Plaintiffs assert that ELIHPA and LIHPRHA gave rise to a taking of their vested contract right to terminate the affordability restrictions after 20 years and operate their

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10. While the court in *Cienega I* dismissed the applicability of *POSSE* on the ground that the unmistakability doctrine may not be applied to a claim seeking damages rather than injunctive relief, this distinction has since been rejected by the Supreme Court. *Yankee Atomic*, 112 F.3d at 1579 (unmistakability doctrine applicable to a contract claim seeking damages) (citing *Winstar*, __ U.S. at __-__, 116 S.Ct. at 2457-58)).

properties free of federal regulation. As it is decided that plaintiffs did not secure a contract right in this regard, plaintiffs cannot state a takings claim on this theory. *See Cavin v. United States*, 956 F.2d 1131, 1135 (Fed. Cir. 1992); *Aulston v. United States*, 823 F.2d 510, 512 (Fed. Cir. 1987). While plaintiffs' complaint may, however, be read to state a claim that the federal restrictions on the use of their property gave rise taking of that property,[11] *see Penn Central*, 438 U.S. 104, that claim is not ripe for review.

As noted earlier, under both ELIPHA and LIHPRHA, Congress provided a process by which owners could either apply to prepay their mortgages and terminate the affordability restrictions, or secure additional financial incentives to maintain the affordability restrictions. This process required an owner to file notice of intent and a plan of action with HUD proposing to terminate the affordability restrictions. HUD could approve such a plan of action if the termination of those affordability restrictions would not materially increase economic hardship for the current tenants, and there was an adequate remaining supply of affordable housing in the community. Plaintiffs do not allege that they

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11. While plaintiffs frame their takings claim primarily as one based on the theory that defendant has taken a discrete contract right, they may be heard to assert a takings claim based on the theory that the defendant has effectively taken their property by restricting its use: "[P]laintiffs as private property owners, had an economically viable interest taken from them for public use by prohibiting them from exercising their vested and exclusive possessory right to deal with their properties freely and without federal control of any nature." *Greenbrier* Compl. 66; *Carrier Arms* Compl. 69, *Hobbs.* Compl. 56, *American River* Compl. 79.

have complied with this process and received a final decision from HUD denying their request to terminate the affordability restrictions. See Malloy Decl. at ¶ 7. Rather, plaintiffs maintain that they should not be required to utilize this process because HUD would be bound to disapprove their requests under the applicable statutory standard, rendering resort to that process futile.

Ripeness doctrine as applied in takings cases requires that a property owner obtain a final decision from the governmental decision maker concerning the applicability of the law to the property at issue. At the threshold, this requires the property owner to make a proper application to that decision maker as required under the governing law. *See Riverside Bayview Homes*, 474 U.S. 121; *Heck*, 134 F.3d at 1470; *Tabb Lakes v. United States*, 10 F.3d 796, 800-01 (Fed. Cir. 1993). Such application is necessary to ripen a takings claim of the kind at issue here because the assertion of regulatory jurisdiction, in and of itself, does not amount to a taking of property:

> [T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking . . . . A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.

Riverside Bayview Homes, 474 U.S. at 126-27.

Appendix B

After making a proper application to the governmental decision maker, ripeness doctrine also requires that a property owner whose proposed use has been denied utilize any variance or similar procedure by which approval could be given for a modified use, *Williamson County*, 473 U.S. at 191,[12] unless resort to that procedure would be futile. *MacDonald*, 477 U.S. at 350 n.9.

Plaintiffs maintain that the futility exception of *MacDonald* excuses them from so much as applying to HUD to terminate the affordability restrictions on the ground that HUD would surely deny their request given the stringent statutory standards by which that request would be judged.

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12. *E.g.*, *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 98 (2d Cir. 1992) (takings claim unripe where denial of permit application did not preclude submission of modified application); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir. 1991) (takings claim unripe where property owner failed to pursue less intensive development scheme after initial denial); *cert. denied*, 502 U.S. 810 (1991); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477, 1480 (N.D. Fla. 1992) (denial of multifamily development did not present ripe takings claim where no application made for single family development permitted by zoning scheme); *Killington, Ltd. v. Vermont*, 164 Vt. 253, 668 A.2d 1278, 1283 (1995) (takings claim unripe where permit denial contained mitigation measures that would satisfy endangered species concerns and allow for development); *Martin County v. Section 28 Partnership, Ltd.*, 676 So. 2d 532, 537 (D.C.A. 4th Fla. 1996) (alternative uses must be applied for and conclusively denied by regulatory body before takings claim will be ripe), *cert. denied*, __ U.S. __, 117 S.Ct. 1553 (1997); *Tinnerman v. Palm Beach County*, 641 So. 2d 523, 525 (D.C.A. 4th Fla. 1994) (futility not established until property owner has submitted one meaningful application for modification, variance, or less intensive use).

While the futility exception of *MacDonald* may be applied to relieve a property owner of the necessity of seeking a variance or other similar relief after a first application for a particular use has been denied, it is not properly applied to a case where, as here, the property owner has not yet applied to engage in the proposed use. *See Riverside Bayview Homes*, 474 U.S. at 126-27. Furthermore, even if it were proper to apply the futility exception on these facts, rigorous statutory criteria, without more, would not be enough to trigger that exception. *Heck*, 37 Fed. Cl. at 252 ("[E]ven if plaintiff showed an objective probability of denial on the merits . . . the application process could not thereby be characterized as 'futile' . . . . A plaintiff cannot plead futility whenever faced with long odds or demanding procedural requirements."), *aff'd*, 134 F.3d 1468.

Plaintiffs' argument that their claim is analogous to that presented in *Suitum*, __ U.S. __, 117 S.Ct. 1659, is without merit. In *Suitum*, the regional land use scheme at issue proscribed the development of the plaintiff's property, but provided the plaintiff with valuable transferrable development rights (TDRs) which she could sell to landowners in areas where development was permissible. *Id.* at 1663-64. While the precise number of TDRs to which the plaintiff was entitled were known and could be appraised, the Ninth Circuit found the claim unripe because the plaintiff had not actually attempted to sell those rights. *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359, 362-63 (9th Cir. 1996). The Supreme Court reversed, finding the claim ripe on the ground that the regional land use authority had rendered its final decision concerning how the law applied to the plaintiff's property. *Suitum*, __ U.S. at __-__, 117 S.Ct.

at 1667-68. The pivotal factor underlying the Court's finality determination was the fact that the statutory scheme at issue did not give the regional land use authority the discretion to modify the development prohibition or afford the plaintiff additional TDRs.

By contrast with *Suitum*, in this case HUD had the discretion under ELIHPA and LIHPRHA to approve plaintiffs' prepayment plans, terminate or modify the affordability restrictions, or grant plaintiffs additional financial incentives to retain those restrictions. Accordingly, *Suitum* lends plaintiffs no support.

CONCLUSION

As it is decided that there was no contractual agreement between plaintiffs and defendant by which plaintiffs promised to maintain the affordability restrictions applicable to their properties for 20 years in exchange for the government's promise to lift those restrictions at the end of that time period, it is **ORDERED** that plaintiff's motion for summary judgment on their breach of contract claim is **DENIED**, and defendant's motion on that claim is **GRANTED**.

Further, because plaintiffs did not apply to HUD as provided in ELIHPA and LIHPRHA in order to determine whether and to what extent the affordability restrictions at issue in this case would be required to be retained under those statutes, plaintiffs' takings claim is not ripe for review. Consequently, it is further **ORDERED** that defendant's motion for summary judgment on plaintiffs' takings claim is **GRANTED**.

Accordingly, it is **ORDERED** that final judgment shall be entered dismissing the complaint as to all named plaintiffs with no costs to be assigned.

s/ James F. Merow
James F. Merow
Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 27, 1999

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-5111

GREENBRIER, WOODLAKE VILLAGE PARTNERSHIP, CARRIER ARMS APARTMENTS, LTD., COLONIAL TERRACE APARTMENTS LTD., FIRST BROOKWOOD, LTD., FIRST BUENA VIDA, LTD., FIRST FAIRMONT II, LTD., FIRST PLAZA DORADO LIMITED PARTNERSHIP, FIRST VILLAGE WEST LIMITED PARTNERSHIP, FIRST PLAZA HILLS EAST LIMITED PARTNERSHIP, HIGH HOUSE VILLAGE APARTMENTS, LTD., HILLCREST APARTMENTS, LTD., JACKSON MANOR APARTMENTS, LTD., SKYLINE FOX HOLLOWJOINT VENTURE, SOUTH PARK APARTMENTS, LTD., SOUTHSIDE VILLAGE APARTMENTS, LTD., FIRST PARKWOOD LIMITED PARTNERSHIP, AMERICAN RIVER LIMITED PARTNERSHIP, ASPEN MANOR, BEAR MOUNTAIN VILLAGE, CAMELOT NORTH COMPANY, CAMELOT SOUTH COMPANY, CANYON APARTMENTS COMPANY, CASCADE TERRACE LIMITED PARTNERSHIP, COTTONWOOD MANOR COMPANY, ELLENDALE ARMS APARTMENTS, ESCONDIDO PARK APARTMENTS, FOOTHILL GARDENS LIMITED PARTNERSHIP, HOLLISTER PLAZA LIMITED, IMPERIAL VILLA APARTMENTS, LA VERNE TERRACE LIMITED PARTNERSHIP, LAUREL

Appendix C

CANYON TERRACE, MEYLER PARK APARTMENTS, MILLER AVENUE APARTMENTS, NAPA PARK LTD., ONTARIO TOWNHOUSES, PALMDALIA LIMITED PARTNERSHIP, QUEEN ANN INVESTMENT COMPANY, ROSE GARDENS HOUSING LIMITED, SANTA CLARA TERRACE COMPANY, TEMPE APARTMENTS, A LIMITED PARTNERSHIP, TEMPE GARDEN I, C.A. HOBBS, JR., LAURYCE G. HOBBS, CHARLES L. ADRIAN, SOUTHBROOK GARDEN APARTMENTS, LTD., SUGAR GROVE SQUARE LTD., HUGH V. SMITH ENTERPRISES, INC. and FIRST FAIRMONT TERRACE, LTD.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing en banc having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

Appendix C

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing en banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on January 3, 2000.

FOR THE COURT,

s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

Dated: December 27, 1999

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN *UNITED STATES OF AMERICA v. DAVID, et al.* DATED JUNE 30, 1998

UNITED STATES of America,

Plaintiff,

v.

George A. DAVID, et al.,

Defendants.

No.94-CV-7191.

United States District Court, E.D. Pennsylvania.

June 30, 1998.

MEMORANDUM & ORDER

J.M. KELLY, J.

Presently before the Court are cross-motions for summary judgment in this action. The United States of America, on behalf of the Department of Housing and Urban Development ("HUD"), commenced this action to recover money that it alleges was illegally withdrawn from four projects financed through HUD programs.

Appendix D

BACKGROUND

Defendants are: the four partnerships that owned four HUD financed projects, Morgan House General Partnership, Carmac Realty Associates, L.P., Overbrook Realty Associates, Ltd. and Foxfield Associates, Inc.; Morgan House Realty Associates, the managing general partner of Morgan House General Partnership; Affiliated Management, Inc., the manager of the properties; G.A. David & Affiliates, Inc., a partner in each of the partnerships and George A. David, the president of Affiliated Management, Inc. and an owner of G.A. David & Affiliates, Inc. Each project[1] was financed in the mid-1980s under a HUD coinsurance program by York Associates, Inc. ("York"). The coinsurance program shifted the administrative burden and some of the risk of HUD financing to the lender. On each project, the borrower signed a mortgage, note and Regulatory Agreement, each drafted by HUD. In July of 1990, York withdrew from HUD's coinsurance program and assigned the mortgages to the Government National Mortgage Association ("GNMA"). York's decision to withdraw from the HUD coinsurance program resulted from the decision of then HUD Secretary Jack Kemp to terminate the coinsurance program.

Each Regulatory Agreement identifies the mortgagee, the mortgagor and the subject property. The purpose of the Regulatory Agreement is set forth as HUD's insuring the note in exchange for the owner's compliance with the National Housing Act and the terms of the Regulatory

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1. All of the properties are subject to an individual mortgage, note and Regulatory Agreement, however there are no property-specific distinctions relevant to the disposition of this motion.

Agreement. The Regulatory Agreement states "this Agreement will continue so long as the contract of coinsurance remains in force." (Regulatory Agreement at 1). Under the Regulatory Agreement, the project owner is required to maintain a reserve, is limited in its ability to make rent increases and is required to maintain the condition of the property. The Regulatory Agreement limits the project owner to using project funds, specifically rent receipts, to pay the mortgage, maintain a reserve, pay reasonable operation and maintenance costs, make distributions from surplus cash and to repay owner advances as authorized by HUD. (Regulatory Agreement, ¶¶ B.3.a., B.3.b., and B.4.a.). There is no surplus cash when payments on the mortgage have not been made. (Regulatory Agreement, ¶ A.9.a. (1)).

HUD alleges that $326,500 was distributed to owners from rents on the four projects while the mortgages were in default. HUD therefore seeks double damages pursuant to 12 U.S.C. § 1715z-4a. HUD also alleges causes of action based upon conversion, unjust enrichment, breach of contract and restitution. Finally, HUD alleges that the payments violate the Federal Priority Statute, 31 U.S.C. § 3713. Defendants argue that the payments in question were repayments of loans from third parties used to finance repairs to the properties and operating costs. Defendants also argue that, by the terms of the Regulatory Agreement, all but one of the challenged payments were made after the Regulatory Agreement expired.

DISCUSSION

Under Fed.R.Civ.P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Defendants argue and HUD concedes that all but one payment of $25,000 are not subject to the Federal Priority Statute. Accordingly, partial summary judgment shall be granted to Defendants on the Federal Priority Statute claim.

The essence of HUD's Motion for Summary Judgment is that various payments made while the projects were in default were in fact illegal distributions to owners.

Appendix D

Defendants present the deposition testimony of Patricia Murray, who states that the payments in question were made to repay loans from third parties. These loans were used to cover operations and maintenance expenses. (Murray Deposition, September 26, 1996, p. 86, lines 13-20). Coupled with the deposition testimony and affidavit of George David, there remain factual issues that preclude Summary Judgment for HUD.

Defendants' Motion for Partial Summary Judgment presents a purely legal issue: does the following statement, contained in the Regulatory Agreement, make the Regulatory Agreement inapplicable following York's assignment of the mortgage to GNMA? "This Agreement will continue so long as the contract of coinsurance remains in force." It is undisputed that most of the payments in question were made after York assigned the mortgages to GNMA and while the mortgages were in default. It is also undisputed that the coinsurance expired upon assignment of the mortgages to GNMA.

Defendants argue that this clause should be given its plain meaning: that when York assigned the mortgages to GNMA, the Regulatory Agreement no longer remained in effect. HUD does not state that the disputed clause is ambiguous, however, HUD presents four reasons that it argues should preclude the termination of the Regulatory Agreement at the termination of the coinsurance: 1) Defendants' interpretation is contrary to the goals and requirements of the National Housing Act, 2) Defendants' interpretation is contrary to regulations promulgated pursuant to the National Housing Act, 3) Defendants' interpretation

is contrary to the language of the mortgage and the note and 4) Defendants' interpretation is inconsistent with other provisions of the Regulatory Agreement. It is therefore clear to the Court that HUD is arguing that the Regulatory Agreement is ambiguous.

The parties agree that the Regulatory Agreement is a contract and is subject to principles of contract interpretation. HUD argues that Defendants incorrectly urge the Court to apply Pennsylvania law rather than Federal Common Law. HUD does not identify relevant differences between Pennsylvania law and federal common law. Where there is no conflict, the Court may draw upon relevant state law to form federal common law. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

Where a party claims that a contract is ambiguous, the Court must look to the interpretations proposed by the parties and determine whether from the linguistic reference point of the parties, the contract can be interpreted in different ways. Compass Technology v. Tseng Laboratories, 71 F.3d 1125, 1131 (3d Cir.1995). The party claiming that an ambiguity exists in a contract must present its proposed alternative meaning and objective evidence in support of its interpretation. Mellon Bank, N.A. v. Aetna Business Credit, 619 F.2d 1001, 1011 (1980). The Court must not, however, lose sight of its primary task in interpreting a contract, to ascertain the intent of the parties as manifested in the language of the contract. Compass v. Tseng, 71 F.3d at 1131. The Court does not search for the subjective intent of the parties, but rather objective manifestations of intent as evidenced in the language chosen to memorialize the

agreement. Williams v. Metzler, 132 F.3d 937, 947 (3d Cir.1997). The Court must interpret a contract in such a way as to give effect to all terms of the contract. Western Union Tel. Co. v. F.C.C., 541 F.2d 346, 350 (3d Cir.1976).

Initially, the Court rejects HUD's argument that the statement that "this Agreement will continue so long as the contract of coinsurance remains in force" is isolated and taken out of context by Defendants, as well as HUD's argument that this clause is inconsistent with other provisions of the Regulatory Agreement. This is the only statement in the Regulatory Agreement that addresses termination of the Regulatory Agreement. It is part of an initial statement of the purpose and scope of the Regulatory Agreement. Further, there is no language in the Regulatory Agreement that contradicts this statement.

HUD argues that Defendants' interpretation of this clause is contrary to the goals of the National Housing Act and regulations promulgated pursuant to the National Housing Act. The Court believes that this clause presents an example of poor contract drafting and HUD never anticipated the termination of the coinsurance program.[2] As this Court's duty in interpreting this contract is to determine the intent of the parties as manifested in the language of the contract, HUD may be bound by the result of this drafting lapse, even though the drafting lapse carries unanticipated consequences.

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2. HUD correctly does not argue that this is an instance of a mistake calling for reformation of the contract. See In re St. Mary's Hospital, 157 B.R. 235, 237 (E.D.Pa.1993) (mistake doctrine applies to existing fact, not future development).

This case differs from Beck Park Apts. v. HUD, 695 F.2d 366 (9th Cir.1982), relied upon by HUD. The Regulatory Agreement clause in question in Beck Park Apts. provided a landlord with a mechanism to obtain approval of rent increases. HUD ordered a rent decrease as a result of property tax reductions. The Court held that a clause allowing a landlord to seek a rent increase did not preclude HUD from exercising its statutory duty to seek a rent decrease. Id. At 369-70. In the present matter, rather than reading statutory or regulatory rights into the Regulatory Agreement, HUD seeks to excise a clause stating when the Regulatory Agreement would be terminated. While the clause adversely effects HUD and the protections provided to HUD under the National Housing Act, this detriment results from HUD's drafting and any other result would require the Court to give no effect to a clause of the Regulatory Agreement.[3] HUD points to no language in the Regulatory Agreement, or any statute or regulation, that would require Defendants to move into another Regulatory Agreement upon the termination of coinsurance.[4]

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3. Were this a case where the Regulatory Agreement conflicted with the actual language of a statute or regulation, the result would be different. See Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-86, 68 S.Ct. 1, 92 L.Ed. 10 (1947) (one who contracts with the government is charged with knowing statutes and regulations, even if the government agent does not).

4. Interestingly, Defendants presented an internal HUD memorandum, dated May 11, 1992, which concludes that the coinsurance Regulatory Agreements had no effect following conversion to full insurance. While this memorandum does not guide the Court's interpretation of the Regulatory Agreement, it is instructive that HUD has found no statutory or regulatory basis to refute Defendants' argument, now over six years after HUD became aware of the problem.

HUD also argues that Defendants' interpretation of this clause is contrary to the language of the mortgage and the note, which together with the Regulatory Agreement comprise the entire contract between the parties and York. Review of the mortgage and note reveal that the owner may not file or execute any discriminatory instrument, (Mortgage ¶ 5), or implement unapproved rent increases, (Mortgage, ¶ 6), while the property is insured under the National Housing Act. The terms of the Regulatory Agreement are incorporated into the mortgage. (Mortgage, ¶ 11). Nothing in these provisions, or any other provision of the note and mortgage, is contrary to the Regulatory Agreement expiring by its explicit terms. In fact, HUD has foreclosed on the four mortgages.

The statement "this Agreement will continue so long as the contract of coinsurance remains in force" is not ambiguous. To give this clause the meaning urged by HUD would be to give this clause no meaning. While the present outcome is certainly not what the parties anticipated, it is the result "not on the parties' having meant the same thing, but on their having said the same thing." Holmes, The Path of the Law, 10 Harv. L.Rev. 457, 463 (1897).

CONCLUSION

As HUD's 12 U.S.C. § 1715z-4a claim is essentially a breach of contract claim, the Court shall grant Defendants' Motion as to those claims for all payments occurring after a mortgage was assigned to GNMA. The Court shall not grant Defendants' Motion as to HUD's claims based upon conversion, unjust enrichment and restitution, as it appears that these claims may exist outside of the Regulatory Agreement. Defendants' Motion on HUD's claim under the

Federal Priority Statute is granted for all payments except one $25,000 payment. Since there are factual issues as to whether the contested payments were distributions to owners, HUD's Motion is denied.

ORDER

AND NOW, this Day of June, 1998, upon consideration of the Motion for Partial Summary Judgment of Plaintiff, the United States of America, and the Response thereto of Defendants, and upon consideration of the Motion for Partial Summary Judgment of Defendants, and the Response thereto of Plaintiff, it is ORDERED:

1. The Motion for Partial Summary Judgment of Plaintiff is DENIED.

2. The Motion for Partial Summary Judgment of Defendants is GRANTED in part. Judgment is ENTERED in favor of Defendants and against Plaintiff on Plaintiff's claim under 12 U.S.C. § 1715z-4a and Plaintiff's breach of contract claim to the extent that those claims relate to contested payments made after Defendants' mortgages were assigned to Government National Mortgage Association.

3. The Motion for Partial Summary Judgment of Defendants is GRANTED in part. Judgment is ENTERED in favor of Defendants and against Plaintiff on Plaintiff's claim under the Federal Priority Statute, 31 U.S.C. § 3713, except for claims related to one payment of $25,000.

4. Defendants' Motion for Summary Judgment is DENIED in all other respects.

APPENDIX E — UNITED STATES' MEMORANDUM IN OPPOSITION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN *UNITED STATES v. DAVID, et al.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 94-7191

UNITED STATES,

Plaintiff,

v.

GEORGE DAVIS, et al.

Defendants.

UNITED STATES' MEMORANDUM IN OPPOSITION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION.

The United States, on behalf of the United States Department of Housing and Urban Development ("HUD"), initiated this action to recover the amount of monies unlawfully withdrawn from the income of four multifamily housing projects. HUD's right to restrict the use of income to the projects arose as a result of the owners availing themselves of financing through a HUD program authorized under the National Housing Act. The United States alleges

that the defendants violated federal regulations, the terms of regulatory agreements they were required to execute in order to be eligible to participate in the HUD program, the federal priority statute and various equitable principles.[1]

The defendants concede that they were participants in a federally insured loan program under the National Housing Act. Essentially, they advance three arguments. First, they argue that they are entitled to summary judgment on counts one through five of the complaint because the regulatory agreements that restrict the use of project funds terminated when the loans became fully insured.[2] Second, the defendants argue that the regulations governing coinsured loans became inapplicable when the loans were converted to full insurance; hence, they violated no federal regulations[3] Finally, they argue that only one challenged distribution in the complaint

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1. Count I alleges a violation of 12 U.S.C. § 1715z-4a. Counts II, III, IV, and V allege respectively, conversion, unjust enrichment, breach on contract, and restitution. Count VI alleges violations of the Federal Priority Statute.

The United States has separately filed a motion for partial summary judgment to which the Court is respectfully referred.

2. The defendants acknowledge that the regulatory agreements contain indentical language.

3. Defendants erroneously state that the United States is relying on state law with respect to counts II, III, and V. Those counts are governed by federal common law. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448 (1979).

violates the federal priority statute, and they are therefore entitled to judgment on that count.[4]

Contrary to the defendants' argument, the regulatory agreements continue in effect as long as HUD has an interest in the mortgage, whether as a coinsurer, a full insurer, or a holder of the loan. Assuming for the purposes of argument that the regulatory agreements expired, the defendants violated federal regulations, and the equitable remedies the United States seeks exist independently of the regulatory agreements. The United States concedes that not all the challenged withdrawals of project funds violate the federal priority statute.

II. THE STANDARD FOR SUMMARY JUDGMENT

Under Rule 56(c), Fed. R. Civ. Pro., a party is entitled to summary judgment if there is no genuine issue as to a material fact and the party has a right to a judgment as a matter of law. Ambiguities in the pleadings and documentary evidence are to be resolved in favor of the nonmoving party, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *American International Group, Inc. v. London American International Corp. Ltd.*, 664 F.2d 348, 351 (2d Cir. 1981). When the movant files a properly supported motion for summary judgment, the burden shifts to the nonmoving party to show "specific facts showing that there is a genuine issue for trial."

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4. Defendants concede for the purposes of their motion that HUD can state a claim with respect to a June 1991 payment made from project funds of Greenway Court to Carmac Realty. Therefore, at most they would be entitled to partial summary judgment on that count.

Rule 56(e). "One of the principal purposes of the summary judgment rules is to isolate and dispose of factually unsupported claims." *Celotex*, 477 U.S. at 323-24 (1986).

The relevant facts necessary to rule on the defendants' motion with respect to Counts I through V of the Complaint are not in dispute.[5] However, the defendants' interpretation of the law is incorrect, and they are not entitled to summary judgment. Their first argument fails because, as a matter of law, the regulatory agreement must be construed as continuing as long as HUD has an interest in a mortgage, whether the loan is coinsured, fully insured or held by HUD. The defendants' conclusion with respect to the regulatory agreement is patently erroneous. The regulatory agreement must be construed in the context of its role in effectuating a program under the National Housing Act and with regard to the documents that together comprise the loan transaction, specifically the mortgage instruments. Consequently, defendants are not entitled to summary judgment on Counts I and IV.

Even if the regulatory agreements expired, HUD would have a right to relief under count one based on the defendants' violations of federal regulations. The defendants' argument that the loans were no longer subject to regulation once the loans became fully insured cannot be sustained. Moreover, the validity of the regulatory agreement has no impact on the government's request for equitable relief, and defendants

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5. The United States does not concede all of the facts as stated by the defendants, but there is agreement with respect to the facts essential to the resolution of this motion.

concede that the United States states a claim under the Federal Priority Statute. Thus, the defendants' motion should be denied.

III. RELEVANT FACTS[6]

Defendants expressly, or by their argument, implicitly concede the following facts:

1. The defendant partnerships elected to participate in an insured financing program under § 207 of the National Housing Act;

2. Defendant David has an ownership interest in each defendant partnership;

3. Defendant Affiliated Management managed the properties;

4. The loans were originally insured with the risk of a borrower default being shared by HUD and the lender, York Associates, Inc.;

5. The partnerships entered into regulatory agreements which restricted the use of project income;

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6. References are either to Defendants' exhibits contained in their appendix which will be cited as Def. Ex. , or to the exhibits filed in support of the United States' Motion for Summary Judgment which will be cited as U.S. Ex.

6. York assigned the notes to the Government National Mortgage Association ("GNMA");

7. The loans became fully insured by HUD;

8. The defendant partnerships defaulted on their obligations to make payments on the mortgages; and

9. Defendant George David authorized payments of project funds which violated the regulatory agreements.[7]

The defendants cannot dispute the fact that when the notes were assigned to GNMA, assignments of the regulatory agreements were executed in favor of GNMA (U.S. Ex. H, ¶ 9).[8] Further, when the defendant owners defaulted on the mortgages, the mortgages and regulatory agreements were assigned by GNMA to HUD. (U.S. Ex. H, ¶ 15).

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7. The defendants make assertions that the payments from project funds which the United States seeks to recoup were made to third parties and that defendant David was "a minor participant in the landing entities and had no interest whatsoever in some of them." Defendants' memorandum at p. 7, ft. nt. 10. No authority is cited in support of this allegation, and it is not conceded by the government.

Defendants make other gratuitous, self serving assertions without supporting references which the United States does not concede. However, the accuracy of the allegations is irrelevant to the outcome of this motion.

8. The U.S. concedes that the defendants dispute the effect of the assignments.

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IV. THE REGULATORY AGREEMENTS CONTINUE SO LONG AS HUD AN INTEREST IN THE MORTGAGE

Defendants' primary contention is that the regulatory agreements have expired. Their argument rests on an isolated sentence in the agreement which is taken out of context.[9] Defendants ignore:

1. The goals and requirements of the National Housing Act;

2. The regulations promulgated pursuant to the National Housing Act;

3. The language of the mortgage and note; and

4. Other provisions of the regulatory agreement which are inconsistent with their interpretation.

As will be seen, defendants' construction of the language is untenable. The only reasonable construction, in light of the above factors, is that the regulatory agreements continue as long as HUD has any obligation with respect to the mortgage on each project whether that interest is as an insurer or owner.

The construction to be given a contract is a question of law for the court. *Barco Urban Renewal Corp. v. Housing*

9. The sentence in the regulatory agreements relied on by the defendants to argue the regulatory agreements terminate states that the, "agreement will continue so long as the contract of coinsurance remains in force.

Authority of the City of Atlantic City, 674 F.2d 1001, 1008 (3rd Cir. 1982). *Armco Inc. v. Glenfad Financial Corporation*, 746 F. Supp. 1249, 1251 (D.N.J. 1990). The terms of a contract must be interpreted as a whole. *Barco Urban Renewal*, 674 F.2d at 1009; *United Telegraph Workers, AFL-CIO v. Western Union Corporation*, 771 F.2d 699, 706 (3rd Cir. 1985); Restatement (Second) of Contracts, § 202 (2) 1981). All writings forming part of the same transaction must be construed together. *Id.* "[T]he polastar of contract interpretation is to ascertain the 'intentions and understanding of the two parties.' [citation omitted]. . . . By intention, courts do not mean the actual subjective intention of the parties, but the objective manifestations of intent." *Barco Urban Renewal*, 674 F.2d at 1008.

Moreover, the agreement at issue here exists by virtue of a federally insured loan program. Therefore, it must be construed in a manner that is consistent with the federal statutes and regulations authorizing HUD to insure/coinsure mortgages. *See, Back Park Apartments v. U.S. Department of Housing and Urban Development*, 695 F.2d 366, 370 (9th Cir. 1982) (A HUD regulatory agreement must be interpreted in light of laws and regulations which have the effect of law); *De Matteo Construction Company v. United States*, 600 F.2d 1384, 1391 (Ct. Cl. (1979) (Regulations must be deemed part of the contract and parties are deemed to have knowledge of them); *Trans-Bay Engineers and Builders, Inc. v. Hills*, 551 F.2d 370, 377 (D.C. Cir. 1976) (The rights and obligations of the parties to a contract under the National Housing Act are governed by HUD's responsibility under the statute). *See also, Texas Gas Transmission Corp. v. Federal Power Commission*, 441 F.2d 1392 (6th Cir. 1971).

It is a settled maxim of contract construction that when "a public interest is involved, 'an interpretation is preferred which favors the public.' Restatement of Contracts § 236 (f).' " *Back Park Apartments*, 695 F.2d at 370.

Viewed in light of these rules of construction, the defendants' argument that the regulatory agreements terminated must fail. First, the interpretation conflicts with the goals and requirements of the National Housing Act. The Congressional declaration of national housing policy states:

> [T]he Congress declares that the general welfare and security of the nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.

42 U.S.C. § 1441.

HUD is required to exercise its duties and responsibilities consistent with this goal *Id.*, *United States v. Winthrop Towers*, 628 F.2d 1028, 1034 (7th Cir. 1980). To that end, it must, "protect the treasure and promote the security of federal

investment which in turn promotes the prime purpose of the [National Housing] Act — to facilitate the building of homes by use of federal credit —," *United States v. OCCI Co.*, 758 F.2d 1160, 1163 (7th Cir. 1985); *Accord, United States v. Baptist Towers II, Ltd.*, 661 F.Supp. 1124, 1126 (N.D. Ill. 1987).

As will be seen, the regulatory agreements are a key tool utilized by HUD to define and regulate the obligations of the agency and program participants to achieve the national housing goal. An interpretation of the language of the regulatory agreements which allows a single sentence to override their purpose is inconsistent with the objective intent of the parties and violates the public interest.

HUD's authority to insure/coinsure the mortgage loans of the defendant owners in this action is predicted on § 207 of the National Housing Act, 12 U.S.C. § 1713 (b) (2). Section, 207 is intended to facilitate, "the production of rental accommodations, at reasonable rents, of design and site suitable for family living." 12 U.S.C. § 1713 (b) (2).

To achieve the goals of § 207, HUD was empowered to enact regulations which could continue as long as HUD was the "owner, holder or reinsurer of the mortgage." 12 U.S.C. § 1713 (b) (2). HUD in fact implemented regulations to govern the program which are found at 24 C.F.R. § 207 *et seq.* To participate in the program, a mortgagor had to agree to be regulated "as to rents or sales, charges, capital structure, rate of return and methods of operation" as long as HUD owned, held, or insured the mortgage. 24 C.F.R. § 207.17(a). The tool for implementing these restrictions in

the case of non-corporate private mortgagors, was a regulatory agreement which continued as long as HUD had obligations related to the mortgage. 24 C.F.R. § 207.18. Thus, under the regulatory scheme the rights and obligations between HUD and the beneficiary of HUD financing are reciprocal and coextensive in duration. As signatories to the regulatory agreements, the defendant owners were constructively on notice of this.

HUD had no authority to insure the mortgages at issue here based on the enabling legislation creating the coinsurance program. In 1974, Congress added § 244 to the National Housing Act. Section 244 authorized HUD to enter into contracts of coinsurance whereby a mortgage lender would share with HUD, the risk of a mortgagor defaulting on its obligations, 24 C.F.R. § 255.1 (1986). It is important to note that § 244 is not a source of authority for HUD to insure a mortgage. It simply allowed HUD to enter into a contract of coinsurance for any mortgage which was otherwise eligible for insurance pursuant to some other section of the National Housing Act providing for insurance. In the coinsurance program, the risk of a mortgagor default was then shared with the lender. *Id.* The relevant section of the National Housing Act authorizing insurance for the loans at issue in this action is the previously discussed § 207 (See the endorsement panel on each note, expressly referencing § 207. Def. Exhibits 1-4).

Under the coinsurance program, a number of functions performed by HUD in administering insured loans were delegated to the mortgage lender. *See* 24 C.F.R. § 255 *et seq.* The regulations in effect when the mortgages at issue were obtained stated that:

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> The Coinsurance Contract provides that the approved lender (i) assume a portion of any loss and (ii) carry out (*subject to monitoring*) underwriting, commitment, property disposition and other functions that the Federal Housing Commissioner . . . approves. [Emphasis added].

24 C.F.R. § 255.1 (a) (1).

The purpose of the coinsurance program was to benefit neighborhoods and existing housing resources. The program was intended to reduce the burden on the agency of processing and monitoring the loans. 24 C.F.R. § 255.1(b) (1981). There is noting to indicate that HUD intended that the demise of a coinsured lender would leave the mortgagor unregulated or excuse a mortgagor from any of its obligations.

Indeed, the regulations under the coinsurance program evidence a firm intention to protect the goals of the National Housing Act while relieving HUD of part of the burden of running the insured loan program. The regulations require that a coinsuring lender operate within the constraints of the National Housing Act. The terms of the Act and of the regulations of the § 255 program are expressly made a part of the coinsurance contract between HUD and the coinsurance lender. 24 C.F.R. § 255.2.

HUD retained the right to set eligibility requirements for coinsuring lenders under 24 C.F.R. §§ 255.101 & 255.102, including determining whether lenders were properly capitalized and possessed the technical and

management competence to carry out the required monitoring functions; requiring that lenders agree to file annual audit reports; be subject to audit by HUD; agree to comply with certain federal laws, regulations and executive orders; notify HUD if capital reserves fell below required levels; and obtain HUD approval prior to transferring assets that would cause reserves to fall below required levels. 24 C.F.R. § 255.102.

A lender could be placed on probation or terminated from the program. 24 C.F.R. § 255.104. Other restrictions designed to safeguard HUD's interest were imposed on a coinsuring lender with respect to a lender's delegation of servicing requirements, 24 C.F.R. § 255.105, and ability to pledge or use as security, the beneficial interest in a coinsured mortgage 24 C.F.R. § 255.108.[10]

The regulations also require that mortgagors who participated in the coinsurance program adhere to standards set by HUD with respect to critical issues, for example: the use of project funds was restricted, 24 C.F.R. § 255.701; the taking of distributions by owners was restricted, 24 C.F.R. § 255.706; maintenance of project books of account was regulated, 24 C.F.R. § 255.706(a); as was obtaining approval for project management. 24 C.F.R. § 255.706(d).

Mortgagors were subject to audit by HUD, 24 C.F.R. § 255.706(f) and were required to submit financial reports. 24 C.F.R. § 255.706(g). There were restrictions on the use

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10, This list of restrictions and requirements to benefit and protect HUD is not exhaustive. The Court is respectfully referred to the regulations which are replete with examples. See 24 C.F.R. § 255 *et seq.*

to be made of the project property, 24 C.F.R. § 255.706(e). The terms of default by a mortgagor and the means to cure a default were established by federal regulations, 24 C.F.R. §§ 255.806 – 255.809. Viewed objectively, program participants had to assume that they would be regulated as long as HUD had an interest in the mortgage, whether as an owner or insurer.

The mortgage instruments support the United States' construction of the language of the regulatory agreements. First, the regulatory agreement is expressly incorporated into the mortgage by reference. The rules of construction require the two documents be examined together to ascertain the parties' objective intent. The mortgage continues until the debt is satisfied and nothing contained in the mortgage indicates that the regulatory agreement will terminate prior to the mortgage.

The critical importance given by the parties to the requirements of the regulatory agreement are evidenced by the fact that a violation of the terms of the regulatory agreement are grounds for HUD calling the loan and declaring the entire debt due and payable. The mortgagors were on notice of this when they signed the regulatory agreements. They cannot claim they expected that their obligations under the regulatory agreements would terminate prior to their fulfillment of their obligations under the mortgage simply because a lender was terminated from the program by HUD[11].

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11. The defendants claim that York's termination as a lender was voluntary. The government disputes this but it is irrelevant for the purpose of this argument.

Finally, an examination of the terms of the regulatory agreement demonstrates that it was intended to be a primary tool in effectuating the § 207 mortgage insurance programs as well as the larger goal of the National Housing Act. Thus, it would obviously need to continue as long as HUD has an interest in the loan. The mortgagor signs an agreement which states that it is entered into, "[i]n return for [HUD's] endorsement for mortgage insurance . . . and to comply with the requirements of the National Housing Act and the regulations and administrative requirements adopted by the Secretary pursuant thereto . . ." The regulatory agreement is the *quid pro quo* for HUD's endorsement of the note for insurance. An applicant for a mortgage either agrees to be regulated, or it does not get insured financing.

An examination of the remaining terms of the regulatory agreement further demonstrates the fallacy of the defendants' argument. The agreement mirrors and further refines the regulations which effectuate HUD's mortgage insurance program. It specifies, among other things, the requirements for the reserve for replacement escrow for major repairs, regulates rent increases, provides guidelines for the use of project property, sets forth guidance for the use of project income, regulates distributions or project income to project owners, restricts repayments of owner advances, and requires that the project be kept in a safe condition. (U.S. Exhibits B2, C2, D2 and E2, Pt. B, Obligations of Owners, Sections 1-8).

The agreement also requires that HUD's approval be obtained or that HUD's, not the coinsuring lender's, requirements be met with respect to numerous items such

as: transfers of physical assets, engaging in other business (if the owner is not a natural person), before conveying any legal interest in project rents or security deposits, and with respect to certain aspects of management of the project, *Id.* sections 9, 10, 11, & 13.

Like the mortgage, the regulating agreement allows HUD to call the loan if the terms of the regulatory agreement are violated. *Id.* at § C1. The agreement also recites the criminal penalty for false statements to the government embodied in 18 U.S.C. § 1001 and part of the criminal provision of the equity skimming statute enacted to protect HUD from misuse of project assets by owners, officers or agents. (The section is now codified at 12 U.S.C. § 17152-19).

It bears noting that both 12 U.S.C. § 17152-19 and 12 U.S.C. § 1715 2 - 4a, which provides the double damages remedy for use of project funds in violation of a HUD regulatory agreement or HUD's regulations, protect HUD while a mortgage is held by HUD, not just during the period the mortgage is insured. These sanctions are further indications that Congress intended that HUD's interest in protecting its rights under a mortgage be co-extensive with its obligations under the mortgages.

The regulatory agreement viewed in the context of its role in the mortgage insurance program, and the requirement that mortgages be regulated as evidenced by the regulations, must be construed to endure as long as HUD insures, coinsures, owns or holds, the mortgage. This interpretation is consistent with the goal of the National Housing program expressed by Congress. Moreover, it interprets the regulatory

agreement in a manner that is consistent with HUD's obligation under the National Housing Act to protect the insurance fund, and the requirement of 24 C.F.R. § 207.18 that the regulatory agreement continue as long as HUD has an obligation under the mortgage.

HUD's authority to insure the notes at issue here arises under § 207 of the National Housing Act. As was noted earlier, the regulations and regulatory agreements under § 207 continue as long as HUD insures or holds the mortgage. 24 C.F.R. §§ 207.17 and 207.18. The defendant owners are charged with knowledge of these regulations. *De Matteo Construction Company*, 600 F.2d at 1391.

Contrary to the defendants' contention, the termination of a coinsuring lender such as York does not end regulation of the mortgagor. The coinsuring lender was always acting on behalf of and subject to a delegation from HUD. HUD's authority to insure the loan arose pursuant to § 207, and the only reasonable construction is the HUD will assume responsibility for monitoring the loan under the § 207 regulations once a coinsuring lenders participation in the program is terminated. Indeed, the defendants reference the section of the coinsurance regulations which requires the Commissioner of the Federal Housing Administration to endorse a mortgage assigned to GNMA for full insurance "in accordance with the appropriate provision of 24 C.F.R. art 207." 24 C.F.R. § 255.827(d) (1991).

An isolated sentence, however poorly drafter, cannot undermine the objective intent of the parties. A contract is

construed against the drafter, only when the construction is reasonable. Restatement of Contracts, § 206 (1981).[12]

The defendants' interpretation of the language of the regulatory agreement also violates sound public policy. Under their theory, the demise of a mortgage lender results in a windfall to a mortgagor who is then free to deplete project income at will, raise rents, and allow the property to deteriorate into a slum or convert it to a use other than rental housing. On the other hand, HUD's obligations under the mortgage contract not only continue but increase because it becomes the sole insurer of the mortgage.

The defendants received over twenty million dollars in mortgage financing. It is unconscionable that they should reap the full benefit of their bargains under the mortgage at the expense of the public.

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12. Defendants cited to an internal HUD memo from Chris Greer, the then Assistant Inspector General for Audit for HUD. The memo references an opinion from an unidentified individual that the regulatory agreement terminates with the contract of coinsurance.

The hearsay statement expressed in the memo does not express the agency's official opinion with respect to the continuation of the regulatory agreement. The agency was treating the agreements as continuing when the issue of their viability arose. After internal deliberations, the General Counsel concluded that the regulatory agreements were enforceable as long as the Secretary had an interest in the loan. (U.S. Exhibit M, Weidenfeller Declaration and attachment thereto). However, the defendants correctly argue in their memorandum that it is the Court which must interpret the contract (defendants' memorandum at p. 12), irrespective of the opinions of either the plaintiff or the defendants.

Appendix E

V. THE DEFENDANTS CONTINUED TO BE SUBJECT TO FEDERAL REGULATIONS AFTER THE LOANS WERE CONVERTED TO FULL INSURANCE

Upon the conversion of the loans to full insurance, the mortgagors became subject to regulation pursuant to the provisions of 24 C.F.R. § 207 *et. seq.* The regulations governing fully insured loans also restrict the use of project funds. The full insurance regulations state that:

> The following are the items which will be regulated or restricted, . . .
>
> (b) Rate of return. (1) Dividends or other distributions, as defined in the charter, trust agreement, or regulatory agreement, may be declared or made only as of or after the end of a semiannual or annual fiscal period. No dividends or other distributions shall be declared or made except out of surplus cash legally available and remaining after: (i) the payment of:
>
> (A) All sums due or currently required to be paid under the terms of any mortgage or note insured or held by the Commissioner; . . .

Title 24 C.F.R. § 207.19.

HUD's handbook governing fully insured mortgages, 4370.2, in effect from 1974 until January 17, 1991, stated that, "[I]f the project is delinquent under the mortgage, loans and advances made by [an] owner to meet necessary and

reasonable operating expenses may not be repaid from project income unless written approval has been given by HUD".[13]

Revisions to the handbook effective in January 1991 which cover the remainder of the period during which the unauthorized distributions were made state that, "[r]epayment of Owner advances when the project is in a nonsurplus cash position will subject the Owner to criminal and civil money penalties."[14] Surplus case calculations were governed by 24 C.F.R. § 207.19(b) (1991). There can be no surplus cash when payments due under the mortgage have not been made. *Id.* Repayments of advances when payments were not current continued to require HUD approval.

HUD's interpretation of its regulations as set forth in the handbooks is entitled to substantial deference. *Rodriguez v. Reading Housing Authority*, 8 F.3d 961, 963-964 (3d Cir. 1993). Indeed, the agency's interpretation of its regulation is controlling unless it is clearly erroneous or contradicts the regulation. *Rodriguez* citing *United States v. Larionuff*, 431 U.S. 864, 872 (1977); *Facchino Construction Co. v. United States Department of Labor*, 987 F.2d 206, 213 (3d Cir. 1993); *Booker v. Cisneros*, 1996 WL 647603 (D.C. Cir. 1996).

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13. *See* Financial Operations and Accounting Procedures for Insured Multifamily Projects dated April 1974 incorporating change 1 6/23/87, Chapter 2, ¶ 8c, p. 8. (U.S. Exhibit 0).

14. *See* Handbook 4370.02, effective 1/91, Chg 2., p. 9, ¶ 8a. (U.S. Exhibit P).

Contrary to the defendants' contention, the conversion of the loans to full insurance did not terminate HUD's ability to regulate the mortgages. It simply ended the enforcement role delegated to the lender. The defendants are thus not entitled to summary judgment against the United States.

CONCLUSION

For the foregoing reasons, the defendants' motion should be denied, and summary judgment granted to the United States as Requested in its separately filed motion.

Respectfully submitted,

MICHAEL R. STILES
United States Attorney

s/ James G. Sheehan
JAMES G. SHEEHAN
Assistant United States Attorney
Chief, Civil Division

s/ Nancy L. Griffin
NANCY L. GRIFFIN
Assistant United States Attorney

APPENDIX F — CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const., amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Emergency Low-Income Housing Preservation Act of 1987, Pub. L. No. 101-242, tit. II, 101 Stat. 1877 (1988)

TITLE II — PRESERVATION OF LOW INCOME HOUSING

Subtitle A — General Provisions

SEC. 201. SHORT TITLE.

This title may be cited as the "Emergency Low Income Housing Preservation of 1987".

Appendix F

SEC. 202. FINDINGS AND PURPOSE.

(a) FINDINGS. — The Congress finds that —

(1) in the next 15 years, more than 330,000 low income housing units insured or assisted under sections 221(d)(3) and 236 of the National Housing Act could be lost as a result of the termination of low income affordability restrictions;

(2) in the next decade, more than 465,000 low income housing units produced with assistance under section 8 of the United States Housing Act of 1987 could be lost as a result of the expiration of the rental assistance contracts;

(3) some 150,000 units of rural low income housing financed under section 515 of the Housing Act of 1949 are threatened with loss as a result of the prepayment of mortgages by owners;

(4) the loss of this privately owned and federally assisted housing, which would occur in a period of sharply rising rents on unassisted housing and extremely low production of additional low rent housing, would inflict unacceptable harm on current tenants and would precipitate a grave national crisis in the supply of low income housing that was neither anticipated nor intended when contracts for these units were entered into;

(5) the loss of this affordable housing, to encourage the production of which the public has provided substantial benefits over past years, would irreparably damage hard-won progress toward such important and long-established national objectives as —

(A) providing a more adequate supply of decent, safe, and sanitary housing that is affordable to low income Americans;

(B) increasing the supply of housing affordable to low income Americans that is accessible to employment opportunities; and

(C) expanding housing opportunities for all Americans, particularly members of disadvantaged minorities;

(6) the provision of an adequate supply of low income housing has depended and will continue to depend upon a strong, long-term partnership between the public and private sectors that accommodates a fair return on investment;

(7) recent reductions in Federal housing assistance and tax benefits related to low income housing have increased the incentives for private industry to withdraw from the production and management of low income housing;

(8) efforts to retain this housing must take account of specific financial and market conditions that differ markedly from project to project;

(9) a major review of alternative responses to this threatened loss of affordable housing is now being undertaken by numerous private sector task forces as well as State and local organizations; and

(10) until the Congress can act on recommendations that will emerge from this review, interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

(b) PURPOSE. — It is the purpose of this title —

(1) to preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with Federal assistance;

(2) to minimize the involuntary displacement of tenants currently residing in such housing; and

(3) to continue the partnership between all levels of government and the private sector in the production and operation of housing that is affordable to low income Americans.

* * *

Appendix F

Subtitle B — Prepayment of Mortgages Insured Under National Housing Act

SEC. 221. GENERAL PREPAYMENT LIMITATION.

(a) PRIOR APPROVAL OF PLAN OF ACTION. — An owner of eligible low income housing may prepay, and a mortgagee may accept prepayment of, a mortgage on such housing only in accordance with a plan of action approved by the Secretary of Housing and Urban Development under this subtitle.

(b) ALTERNATIVE PREPAYMENT MORATORIUM. — In the event any court of the United States or any State invalidates the requirements established in this subtitle, an owner of eligible low income housing located in the geographic area subject to the jurisdiction of such court may not prepay, and a mortgagee may not accept prepayment of, a mortgage on such housing during the 2-year period following the date of such invalidation.

* * *

Appendix F

Low-Income Housing Preservation Act of 1990, Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (1990), 12 U.S.C. § 4101 *et seq.*

TITLE VI — PRESERVATION OF AFFORDABLE RENTAL HOUSING

Subtitle A — Prepayment of Mortgages Insured Under National Housing Act

SEC. 601. PREPAYMENT OF MORTGAGES.

(a) IN GENERAL. — Subtitles A and B of the Emergency Low Income Housing Preservation Act of 1987 (12 U.S.C. 1715*l* note) are amended to read as follows:

"Subtitle A — Short Title

"SEC. 201. SHORT TITLE.

"This title may be cited as the 'Low Income Housing Preservation and Resident Homeownership Act of 1990'.

"Subtitle B — Prepayment of Mortgages Insured Under National Housing Act

"SEC. 211. GENERAL PREPAYMENT LIMITATION.

"(a) PREPAYMENT AND TERMINATION. — An owner of eligible low-income housing may prepay, and a mortgagee may accept prepayment of, a mortgage on such housing only in accordance with a plan of action approved by the Secretary

under this subtitle or in accordance with section 224. An insurance contract with respect to eligible low-income housing may be terminated pursuant to section 229 of the National Housing Act only in accordance with a plan of action approved by the Secretary under this subtitle or in accordance with section 224.

"(b) FORECLOSURE. — A mortgagee may foreclose the mortgage on, or acquire by deed in lieu of foreclosure, any eligible low-income housing project only if the mortgagee also conveys title to the project to the Secretary in connection with a claim for insurance benefits.

"(c) EFFECT OF UNAUTHORIZED PREPAYMENT. — Any prepayment of a mortgage on eligible low-income housing or termination of the mortgage insurance on such housing not in compliance with the provisions of this subtitle shall be null and void and any low-income affordability restrictions on the housing shall continue to apply to the housing.

* * *

24 C.F.R. § 221.524 (1970)

§ 221.524 Prepayment privileges.

(a) *Prepayment in full* — (1) *Without prior Commissioner consent.* A mortgage indebtedness may be prepaid in full and the Commissioner's controls terminated without the prior consent of the Commissioner in the following cases:

Appendix F

(i) Where the mortgage is insured under section 221(d)(4) of the Act.

(ii) Where the mortgagor is a limited distribution type, which is not receiving payments from the Commissioner under a rent supplement contract executed pursuant to the provisions of §§ 5.1 et seq. of this title, and where the prepayment occurs after the expiration of 20 years from the date of final endorsement of the mortgage.

(iii) Where the project is converted to condominium ownership or is purchased by a cooperative mortgagor, which actions are taken pursuant to section 221(i) or 221(j) of the Act.

(iv) Where the mortgage is insured pursuant to section 221(h) of the Act and the prepayment occurs as a result of a sale of the individual units comprising the project.

(2) *With prior Commissioner consent.* In all other cases, except those outlined in subparagraph (1), a mortgage indebtedness shall not be prepaid in full and the Commissioner's controls will not be terminated unless the Commissioner gives his prior consent to such prepayment.

(b) *Partial prepayments.* With the prior written approval of the Commissioner, partial prepayments may be made for the purpose of reducing succeeding monthly payments of the remaining balance as recast over the remaining portion of the original mortgage term.

(c) *Optional provision.* The mortgage may, if required by the mortgagee, contain a provision that, prior to maturity,

and with the approval of the Commissioner, partial prepayments may be made, after thirty days' written notice to the mortgagee, on any principal payment date. If prepayments are made in any calendar year in excess of 15 percent of the original face amount of the mortgage, the mortgagee will be permitted to collect such reasonable charge on such excess as is agreed upon between the mortgagor and the mortgagee.

* * *

24 C.F.R. § 236.30 (1970)

§ 236.30 Prepayment privileges.

(a) *Prepayment in full* — (a) *Without prior Commissioner consent.* A mortgage indebtedness may be prepaid in full and the Commissioner's controls terminated without the prior consent of the Commissioner where the mortgagor is a limited distribution type and either of the following conditions is met:

(i) If the prepayment occurs after the expiration of 20 years from the date of final insurance endorsement of the mortgage, provided the mortgagor is not receiving payments from the Commissioner under a rent supplement contract executed pursuant to the provisions of §§ 5.1 et seq. of this title.

(ii) If the prepayment occurs as a result of the sale of the project to a cooperative or private nonprofit corporation or association, provided the sale is financed with a mortgage insured pursuant to § 236.40(d).

(2) *With prior Commissioner consent.* In all cases, except those outlined in subparagraph (1) of this paragraph, a mortgage indebtedness shall not be prepaid in full and the Commissioner's controls shall not be terminated unless the Commissioner gives his prior consent to such prepayment.

(b) *Partial prepayments.* With the prior written approval of the Commissioner, partial prepayments may be made for the purpose of reducing succeeding monthly payments of the remaining balance as recast over the remaining portion of the original mortgage term.

(c) *Optional provision.* The mortgage may, if required by the mortgagee, contain a provision that, prior to the maturity and with the approval of the Commissioner, partial prepayments may be made after 30 days' written notice to the mortgagee on any principal payment date. If prepayments are made in any calendar year in excess of 15 percent of the original face amount of the mortgage, the mortgagee will be permitted to collect such reasonable charge on such excess as is agreed upon between the mortgagor and the mortgagee.

(d) *Prepayment in connection with sale of units.* With the prior written approval of the Commissioner, the mortgagor may sell the individual dwelling units in the project to lower income, elderly, or handicapped purchases. The mortgagee shall not collect any charge for the prepayment of the mortgage in connection with the sale of such units.

* * * *

Supreme Court, U.S.
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No. 99-1577

In the Supreme Court of the United States

GREENBRIER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the enactment of legislation conditioning the prepayment of loans insured by the Department of Housing and Urban Development (HUD) upon HUD approval effected a taking of private property without compensation in violation of the Fifth Amendment to the United States Constitution.

2. Whether a claim that the legislation as applied to petitioners effected a taking is ripe.

3. Whether that legislation breached a contract between petitioners and the United States.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 193 F.3d 1348. The opinion of the Court of Federal Claims (Pet. App. 30a-65a) is reported at 40 Fed. Cl. 689.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a-29a) was entered on October 4, 1999. A petition for rehearing was denied on December 27, 1999 (Pet. App. 66a-68a). The petition for a writ of certiorari was filed on March 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the 1960s and 1970s, petitioners entered into separate agreements with HUD and private lenders for the purpose of financing the construction of low and

moderate income housing projects. Pet. App. 4a. Each transaction involved a similar set of agreements. First, petitioners and a private lender applied for and received from HUD a commitment to provide mortgage insurance subject to various conditions. *Id.* at 5a-6a. Second, after receiving commitments for insurance, the lender and developer executed 40-year mortgage notes and mortgages on the properties. *Id.* at 6a. Third, the developer signed a separate "regulatory agreement" with HUD, under which the developer agreed to make timely payments on the mortgage note and to observe low-income affordability restrictions. *Id.* at 7a. Fourth, in consideration of the developer's promises under the regulatory agreement, HUD endorsed the mortgage note, which effectively created a contract of mortgage insurance between HUD and the lender. *Ibid.*

HUD's mortgage insurance and a developer's regulatory agreement were to remain in effect for the duration of the loan. Pet. App. 7a. Prepayment of a loan would therefore terminate both the insurance and the regulatory agreement, allowing the developer to operate its project without regard to HUD's affordability restrictions. The regulatory agreement between HUD and the developer did not address prepayment of the loan or incorporate any other agreement on that issue. *Ibid.* The only document that addressed prepayment was the mortgage note. *Id.* at 6a. In most instances, the note provided that the loan could not be prepaid without HUD approval for the first 20 years of its term, but could be prepaid without approval after that time. *Ibid.*

In the late 1980s, Congress became concerned that owners of many housing projects might soon choose to prepay HUD-insured loans, potentially resulting in a shortage of low-income rental housing. Pet. App. 8a. In

1988, Congress responded by enacting the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), Pub. L. No. 100-242, Tit. II, 101 Stat. 1877 (12 U.S.C. 1715*l* note). ELIHPA required developers to obtain approval from HUD before prepaying HUD insured loans. § 221, 101 Stat. 1878-1879. In order to approve a prepayment plan, HUD was required to find that (1) prepayment would not materially increase economic hardship for current tenants and (2) the supply of vacant, comparable housing would be sufficient to serve the community. § 225, 101 Stat. 1880. As an inducement to the owners not to prepay their notes, ELIHPA also authorized HUD to provide financial incentives to owners that agreed to remain in the low-income housing program voluntarily. 101 Stat. 1880-1881. See also Pet. App. 8a.

In 1990, Congress replaced ELIHPA with the Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA), 12 U.S.C. 4101 *et seq.* LIHPRHA also required owners to secure HUD approval before prepaying their loans. In order to approve prepayment, HUD was required to make findings similar to the findings required under ELIHPA. See 12 U.S.C. 4108(a), 4112(a).

In 1996, dissatisfied with the costs of LIHPRHA, Congress enacted the Housing Opportunity Program Extension Act of 1996 (HOPE), Pub. L. No. 104-120, § 2, 110 Stat. 834. HOPE authorizes owners to prepay their loans without HUD's prior approval, provided they do not raise rents for 60 days following prepayment.

2. After the enactment of HOPE, petitioners filed suit against the United States in the Court of Federal Claims. Pet. App. 9a. Petitioners alleged that ELIHPA and LIHPRHA effected an uncompensated

taking of private property under the Fifth Amendment. *Id.* at 10a. Petitioners also alleged that the prepayment restrictions imposed by ELIHPA and LIHPRHA breached a contractual commitment by HUD permitting petitioners to prepay their loans at any time after 20 years. *Ibid.*

The Court of Federal Claims granted summary judgment in the government's favor on both claims. Pet. App. 30a-65a. The court rejected petitioners' taking claim on the ground that it was not ripe for review because petitioners never applied to HUD for permission to prepay their loans and never received a final decision from HUD that they could not prepay them. *Id.* at 59a-64a. The court rejected petitioners' breach of contract claim on the ground that HUD was not a party to the agreement that gave petitioners a right to prepay their loans after 20 years. *Id.* at 46a-56a.

3. The court of appeals affirmed. Pet. App. 1a-26a. The court held that the enactment of ELIHPA and LIHPRHA did not effect a taking of petitioners' property. *Id.* at 18a-20a. The court noted that, under *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), a statute "that provides for a government entity to make a discretionary decision as to the conditions of use of property cannot be found to have taken property upon enactment." Pet. App. 18a. Since ELIHPA and LIHPRHA provide that owners may prepay their loans as long as they obtain HUD approval, the court concluded, "[t]heir enactment cannot * * * constitute a taking of any property." *Id.* at 20a.

The court further held that petitioners' claim that the statutes, as applied, took their property, is not ripe. Pet. App. 21a-23a. The court observed that, under this Court's decisions, an as applied takings claim is not ripe unless the government makes a final decision con-

cerning the property at issue. *Id.* at 21a. In this case, the court explained, petitioners did not follow the procedures for obtaining permission from HUD to prepay their loans, much less receive final decisions from HUD denying them such permission. *Id.* at 22a.

Finally, the court rejected petitioners' breach of contract claim on the authority of its earlier decision in *Cienega Gardens* v. *United States*, 162 F.3d 1123 (Fed. Cir. 1998), cert. denied, 120 S. Ct. 62 (1999), a case involving substantially-identical mortgage insurance transactions. Pet. App. 11a-13a. In *Cienega*, the court of appeals first noted that the Tucker Act, 28 U.S.C. 1491(a)(1), waives sovereign immunity with respect to contract claims only when there is "privity of contract between the plaintiff and the United States." 162 F.3d at 1129-1130. Assessing the transactions at issue, the court in *Cienega* concluded that the United States and the owners were not in privity of contract with respect to prepayment terms because (1) the regulatory agreements between the owners and HUD contained no provisions relating to prepayment and did not incorporate any such provisions by reference, and (2) HUD was not a party to the agreement between the lender and the owners that contained prepayment terms. *Id.* at 1132-1133.

ARGUMENT

1. Petitioners contend (Pet. 14-18) that the court of appeals erred in its assessment of their taking claim. That contention is without merit and does not warrant review.

The court of appeals' rejection of petitioners' taking claim rests on two grounds. First, the court held that the mere enactment of ELIHPA and LIHPRHA could not effect a taking of petitioners' asserted right to pre-

pay their loans, since both statutes provided that owners could prepay their loans as long as they obtained HUD approval. Pet. App. 18a-20a. Second, the court held that petitioners' as applied challenge is not ripe since petitioners neither sought permission from HUD to prepay their loans nor received a final decision from HUD denying them permission. *Id.* at 21a-23a. Each of those holdings is correct.

a. Petitioners' contention that the mere enactment of ELIHPA and LIHPRHA effected a taking was correctly rejected by the court of appeals based on this Court's decision in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, the Court held that a requirement that a landowner must obtain a permit before using property in a particular way does not take property within the meaning of the Fifth Amendment. *Id.* at 126. The Court specifically explained that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *Ibid.* The Court elaborated on its reasoning as follows:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Id. at 127.

As the court of appeals concluded, since ELIHPA and LIHPRHA did not prohibit petitioners from prepaying their loans, but merely required that they obtain HUD approval before prepaying their loans, *Riverside Bayview Homes* forecloses petitioners' contention that the enactment of those statutes effected a taking of petitioners' property. Like a requirement that a person obtain a permit, a requirement that a person obtain HUD approval for a prepayment plan, "does not itself 'take' the property in any sense." 474 U.S. at 127. The very existence of a prepayment approval process "implies that permission may be granted, leaving [petitioners] free to [prepay] as desired." *Ibid.* Only when approval to prepay "is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Ibid.* The court of appeals therefore correctly rejected petitioners' broad contention that the very existence of a prepayment approval requirement effected a taking of their property.

b. The court of appeals also correctly refused to entertain petitioners' as applied takings claim. This Court has held that, in order to make an as-applied takings challenge, a party must first obtain a final decision from the relevant government agency concerning how a statute will be applied to the property in question. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Such a final decision is necessary, because "among the factors of particular significance in the [takings] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations," and those "factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position

regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191.

As the court of appeals in this case noted (Pet. App. 22a), petitioners did not seek permission from HUD to prepay their loans, much less obtain from HUD a final decision on such a request. There is therefore no basis for evaluating the economic impact of ELIHPA and LIHPRHA on petitioners or the extent to which it interfered with their investment-backed expectations. In these circumstances, the court of appeals correctly refused to entertain petitioners' as applied challenge.

c. Petitioners contend (Pet. 15-18) that the decision below conflicts with *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). There is, however, no conflict.

In *Suitum*, a landowner challenged as a taking a state agency's determination that her property was ineligible for development. 520 U.S. at 728. The Court held that the landowner's taking claim was ripe, because the agency had made a final decision that the property in question was ineligible for development, and the agency had no discretion to exercise over the property. *Id.* at 739. The situation here is entirely different. The statutes in question gave HUD discretion to permit petitioners to prepay their loans, and petitioners neither sought nor received a final decision from HUD on that issue. *Suitum* is therefore inapposite here.

Petitioners' reliance on *Eastern Enterprises* is similarly misplaced. In that case, the Court held that a statute that made certain employers responsible for funding health care benefits for retirees from the coal industry was unconstitutional as applied to Eastern. The Court reasoned that the legislation imposed severe

retroactive liability on Eastern and that the liability was unrelated to any commitment made by Eastern or any injury it had caused. 524 U.S. at 537 (plurality opinion); *id.* at 549-550 (Kennedy, J., concurring in the judgment and dissenting in part). With respect to the impact of the legislation on Eastern, "there is no doubt" that the statute in question "forced a considerable financial burden upon Eastern," with estimates ranging from $50 to $100 million. *Id.* at 529 (plurality opinion).

In contrast to the statute at issue in *Eastern Enterprises*, ELIHPA and LIHPRHA did not impose any liability on petitioners. Instead, as noted above, it simply required petitioners to obtain approval from HUD before prepaying their loans. Moreover, because petitioners neither sought permission to prepay nor received a decision denying them permission to do so, there is no basis for a finding that ELIHPA and LIHPRHA had any economic effect on petitioners, much less the kind of substantial, unexpected, and disproportionate effect that triggered constitutional concern in *Eastern Enterprises*. Petitioners' contention that the decision below conflicts with *Eastern Enterprises* is therefore incorrect.

2. Petitioners contend (Pet. 18-28) that the court below erred in rejecting their breach of contract claim. This Court recently denied certiorari on a nearly identical claim, *Sherman Park Apartments* v. *United States*, 120 S. Ct. 62 (1999), and there is no reason for a different outcome here.

a. Petitioners argue (Pet. 18-28) that they secured a contractual right from HUD that they could prepay their loans without HUD approval after 20 years. As the court of appeals held, however, a plaintiff may assert a contract claim against the United States only when there is privity of contract between the plaintiff

and the United States. Pet. App. 11a. And, in this case, there was no privity of contract between the United States and petitioners concerning prepayment terms. In particular, the regulatory agreements between petitioners and HUD contained no provision relating to prepayment and did not incorporate any such provisions by reference, and HUD was not a party to the agreement between the lenders and petitioners giving petitioners a right to prepay their loans after 20 years without HUD approval. *Id.* at 12a-13a. The court of appeals therefore correctly rejected petitioners' breach of contract claim.

b. Petitioners err in contending (Pet. 20-22) that the decision below conflicts with this Court's decision in *United States* v. *Winstar Corporation*, 518 U.S. 839 (1996). In *Winstar*, financial institutions alleged that they had contracts with the United States allowing the use of supervisory goodwill to satisfy a portion of their regulatory capital requirements. Although the contracts did not expressly address the issue, they contained integration clauses that expressly incorporated contemporaneous documents, and the Court concluded that the incorporated documents allowed the financial institutions to use supervisory goodwill to satisfy capital requirements. See 518 U.S. at 860-868.

The situation here is entirely different. Here, while petitioners allege that they had contracts with HUD allowing them to prepay their loans after 20 years without HUD approval, the contracts between petitioners and HUD do not address prepayment and do not incorporate any documents addressing prepayment. There

is therefore no conflict between the decision in *Winstar* and the decision below.[1]

Petitioners contend (Pet. 21) that the absence of an integration clause incorporating prepayment terms is not fatal to their claim. The critical point, however, is that petitioners are unable to cite any language in their agreements with HUD that could serve as a basis for a conclusion that those contracts contain terms relating to prepayment. Moreover, the absence of an integration clause incorporating prepayment terms is especially significant in the present context because other documents involved in the transactions contain express language of incorporation. See C.A. App. 151 ("Note and all its terms are incorporated herein by reference."); C.A. App. 1148 ("This Note is secured by a mortgage of even date * * * and all the provisions of said instrument are incorporated herein and are to be deemed a part hereof as fully as though herein set out."); C.A. App. 229 ("The provisions of the rider hereto attached are incorporated in and made a part of this Note."). The absence of any comparable clause incorporating prepayment terms is telling evidence that

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[1] To support their contract claim, petitioners also rely (Pet. 23-24) on remarks of former HUD officials and members of Congress, and the declaration of Lawrence R. Burk. Those statements, however, were made 20 to 30 years after the transactions at issue in this case, and there is nothing to suggest that those individuals were familiar with the agreements at issue here. More fundamentally, the question whether HUD entered into agreements regarding prepayment terms ultimately turns on the language of the agreements, and the materials petitioners cite are no substitute for contract language they failed to secure. See *Cienega*, 162 F.3d at 1134 ("The after-the-fact views of various parties cannot create a contractual relationship between HUD and [petitioners] with respect to prepayment terms, where the contractual documents themselves fail to evidence such a relationship.").

HUD did not contractually bind itself to particular prepayment terms.[2]

c. Also without merit is petitioners' claim (Pet. 25) that the government's position in this case conflicts with its position in *United States* v. *David*, No. 94-7191, 1998 WL 351693 (E.D. Pa. June 30, 1998). *David* involved the "section 244" coinsurance program of the National Housing Act, 12 U.S.C. 1715z-9. Pursuant to that program, the *same parties* entered into a regulatory agreement, mortgage, and note. In those circumstances, the government argued that the agreements should be interpreted as a coherent whole. See Pet. 26. There is no inconsistency between that unexceptional argument and the government's argument in this case that HUD did not commit itself to certain prepayment terms when its contracts with petitioners do not address prepayment or incorporate other documents that address prepayment, and when HUD is not a party to the prepayment agreements between petitioners and their lenders.

d. Finally, petitioners argue (Pet. 28) that, by "adopting" the "regulations *then in effect* into [HUD's]

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[2] Petitioners also argue (Pet. 21-22) that this Court would have reached the same result in *Winstar* even absent the integration clauses, based upon "the overall facts and circumstances" of those transactions. In *Winstar*, however, this Court only stated that, to the extent the integration clauses were ambiguous, the "realities" of the transaction "favored" reading those documents as contractual commitments. 518 U.S. at 863. In any event, the "realities" surrounding the programs in this case do not support the conclusion that the parties regarded prepayment provisions as binding contractual commitments. Unlike the thrifts in *Winstar*, petitioners would not have been subject to regulatory noncompliance, penalties, or financial distress in the absence of a contractual commitment permitting prepayment of their mortgage notes at some point prior to the note's maturity.

endorsement of the Note," HUD "relinquished its right to change the terms of the contract by amending those regulations," including those permitting prepayment. The regulations in effect at the time of HUD's endorsement, however, specifically provided that HUD's endorsement of the note marked a contract of mortgage insurance between HUD and the lender, under which HUD and the lender were "bound by the provisions of [24 C.F.R. Pt. 207, subpt. B] and the applicable sections of [the NHA]." See, *e.g.*, 24 C.F.R. 207.254(c) (1970). The referenced regulations therefore have no bearing on the contract between HUD and petitioners. Moreover, the prepayment regulations, *e.g.* 24 C.F.R. 221.524(a)(ii), 236.30(a) (1970), were not part of 24 C.F.R. Part 207, subpart B. The prepayment regulations therefore could not be viewed as part of any contract allegedly formed between the owners and HUD by the insurance endorsement. See *Lurline Gardens Ltd. Housing Partnership* v. *United States*, 37 Fed. Cl. 415, 420 n.7 (1997).

Even if we assume that the notes' reference to regulations embraced all regulations applicable to the relevant statutory programs, including the prepayment rules, that would not assist petitioners. If such an interpretation were adopted, it would also embrace the regulations in which HUD reserved the power to amend the prepayment rules, *e.g.* 24 C.F.R. 221.749, 236.249 (1970), and that reservation would have to be read into any contract along with the prepayment rules. *Cienega*, 162 F.3d at 1134. Analysis of the applicable regulations in effect at the time of the transactions therefore cuts against, rather than in favor of, petitioners' contractual argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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